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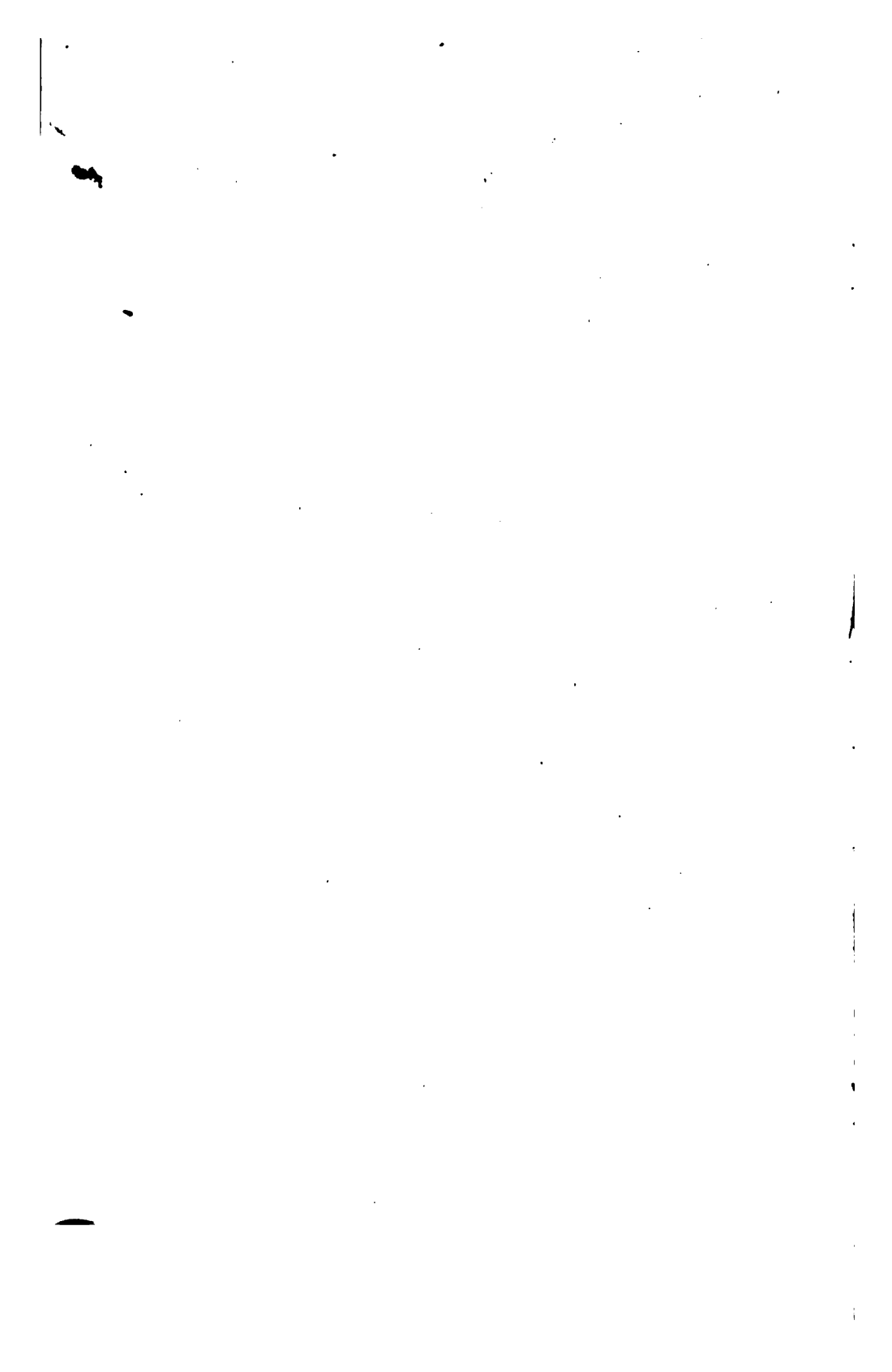
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THE HISTORY

OF THE

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ENGLISH CONSTITUTION.

BY

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PROFESSOR OF LAW AT THE UNIVERSITY OF BERLIN.

TRANSLATED BY

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## AUTHOR'S PREFACE.

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THE History of the Constitution of England has hitherto only been written with regard to the Middle Ages, and separate centuries since the Reformation. In venturing to draw a picture of the thousand years' Constitutional History of such a nation, I must necessarily begin with an apology in order to explain the shortcomings and inequalities of my work, and in some measure to justify them in the eyes of the benevolent reader.

My writings upon the English Constitution did not originate in a uniform scientific plan; my Roman law professorship offered few points of connection with this subject, although I am much indebted, in these writings, to the works upon the history of Law of my revered teacher, von Savigny. It was rather the efforts for reform in the German legal procedure which gave rise to these essays. Brought up in the laborious and strict school of Prussian Judges, at a time when the whole task of formulating the matter in litigation was entailed upon the judge who personally directed the pleadings of the parties, and having acquired a personal knowledge of the political and social state of Germany, England, and France, I had become sufficiently intimate with the advantages of our nation of officials, as well as with the weak points of our system, both in legal procedure and administration. I felt most keenly the necessity of the fundamental reforms in this department, which I have for many years advocated in my academical lectures, at a time when

the majority of my colleagues stood aloof from, and were opposed to, the reforms that have since been introduced. It was precisely the differences in opinion upon this subject which gradually led me to the conviction, that the so-called philosophical schemes in public law chiefly originate in a lack of positive knowledge of circumstances. My own work on "Trial by Jury" (Berlin, 1849) bears witness to the truth of this statement.

It was the period of storm and stress in 1848 that first led me from the domain of law to the wider one of politics. A closer acquaintance with the condition of affairs in France and England, more especially with the excellent treatises of Lorenz Stein on those of the latter country, made me somewhat reserved and doubtful in my attitude towards the new constitutional development. I declined a summons to the National Assemblies of that time, and preferred to take part in the administration of a great provincial system, which gave to my political ideas a more practical direction, corresponding to the experience that the ruling class in England gains every day in its provincial activity.

The constitutional struggles in Prussia soon took the shape of a decisive conflict between the old and the new form of society; a dispute which was to be finally settled in Prussia for the whole of Germany. I was led by this struggle to examine with greater care into the real origin of the social relations of the various classes in Central Europe, in order to illustrate the rights and wrongs of Feudalism and Democracy by the position of classes in England ("Adel und Ritterschaft in England," 2nd edition, 1853). The recognition this work obtained in many circles encouraged me to further labour.

Meanwhile the ministerial government in Prussia had proceeded in a direction which might well be considered a realization of the theories of Constitutional Government which had prevailed up to that time; but its effect in Prussia was sufficient to demonstrate how utterly inapplicable to Germany were the French and Belgian models. When this

confusion was at the worst, between 1853 and 1856, I began my investigations in the domain of English Administrative Law, the most difficult of the whole series of the labours, and one that I might well compare to a walk through a primæval forest. With good, though incomplete sources of reference at hand, I succeeded in tracing amongst the chaos of disconnected antiquarian matter piled up around Blackstone's Commentaries, a connected system of laws reaching back into the Middle Ages, while Parliamentary papers enabled me to produce as realistic a picture as possible of the administration of to-day ("Geschichte und heutige Gestalt der Ämter in England," 1857). This tract was written not merely in reference to the Prussian abuses of administration, but was intended to draw attention to just what the constitutional theories had forgotten in their long struggle for a suitable popular representation, viz. that building up of a fair administration from the lowest foundation, which is a necessary element in a popular state. This work has not been without its influence upon Germany in filling up a material gap, and, if I am not mistaken, it has in England also influenced some later views of Constitutional History.

Being dissatisfied with this partial view of the subject, and having obtained a more complete body of material upon which to work, I ventured upon the task of writing a history of the English Parliament. But the task of developing the system of English polity in its true aspect, led to my intended History of Parliament becoming a detailed history of the English administrative law ("Englisches Verwaltungsrecht," 2nd ed., 1867, vol. i., Historical pt., 648 pages).

Meanwhile, in the year 1858, constitutional monarchy was restored as the form of government in Prussia, with the honest endeavour to return to an administration according to the law, and to proceed with the construction of the inner fabric of the State. Together with many of my political friends I hoped that the time had arrived for "opposing positive tendencies to the negative tendency of our national policy,

for exchanging vague and formless efforts for fixed and settled aims and objects to be gained by attainable means." With regard to the reorganization itself, every one was satisfied that a system of "self-government" was a necessity; but each of the two political parties in the realm, and the body of State officials, respectively understood by this term three very different and wholly incompatible systems. It was the natural consequence of a state of affairs, in which the official world and two distinct orders of society had been involved for a whole generation in a dispute concerning the constitution. It was no easy matter gradually to reconcile prevailing ideas to the truth, that in a modern state, parishes and district unions can no longer be autonomous bodies, but are, primarily, only the executive organs of our more fully developed administrative law, and that local rates cannot be severed from our system of political economy. Hence a legislation that would rise above all party views was seen to be a vital necessity; just as in England the inner fabric of the constitution was not the outcome of parliamentary legislation, but proceeded in its day from the organic laws dictated by the Privy Council. In order to further these legislative labours, or at least to prevent an overhasty imitation of the French model, in the regulation of parishes and districts, there appeared a work which I had somewhat speedily completed, entitled "*Die Englische Communal-Verfassung oder das System des Self-government*" (1860). Soon afterwards I was able to rewrite with greater care my history of "self-government" ("*Engl. Communal-Verfassung*," 2nd ed., 1863), and to give a description of the modern English municipal reforms down to the times when the organic legislation in Prussia really began its work ("*Engl. Communal-Verfassung*," 3rd ed., 1871).

After the Prussian and with it the German constitutional question had been successfully solved, the time for actual construction had arrived, viz. the time for positive reforms of our administrative system, especially our police laws, local juris-

diction, local taxation, municipal regulations, etc. ("Verwaltung, Justiz, Rechtsweg," etc., Berlin, 1869). For Prussia I made the principal basis of my work the reformed administrative and social legislation of Stein and Hardenberg, the municipal regulations of 1808, and the existing parochial system in country and town. But whilst I carefully avoided transferring into our German institutions any name or institution from English life, yet in all cases where our officials had no practical experiences at hand to guide them in new combinations in administrative law or local government, I made use of parallels taken from England. In subsequent years there followed essays which dealt with our constitutional disputes, and with the question of reform in our legal procedure, as well as in our administration; among which the legislative proposals touching the Prussian Kreisordnung, school board administration, provincial taxation, the principle of legality in the administrative (Rechts-staat), the reform of the legal profession, of the magistracies, of penal procedure, etc., repeatedly brought me better points of view of and parallels with the English law.

Thus there gradually arose, in addition to a continuous history of administrative law and "self-government," a chain of parallels for various points of the inner life of the state, in which, thanks to the energetic development of the royal prerogatives, the English and Prussian constitutions are much more intimately related than is generally supposed.

It cannot be denied that these writings appeared in an epoch and in the midst of the most profound political crisis in my native land (during the last years of Frederick William III., under Frederick William IV., during the regency, and under William I., Emperor and King); and appeared, too, under the pressure imposed upon me by my academical duties, as well as that entailed by a magistracy and a provincial office, and by a long and active parliamentary life. Though all this has probably been instrumental in producing a many-sided appreciation of affairs, it necessarily had an

unfavourable effect upon the systematic arrangement of those writings; besides which, in a work directed towards an immediate and practical end, the connection of the whole cannot always be sufficiently kept in view and expressed. Hence arose on my part a natural desire to put together the English constitutional history in a larger and more coherent form, using as a basis the work most nearly complete in itself, the history of English administrative law, from which I could retain the divisions into periods and chapters because it was originally designed for a history of parliamentary law. As regards this portion, the present work appears as a third edition. And here I have repeated an old experience gained on the German judicial bench, namely, that where, after many interlocutory judgments, the final judgment has been reached in any litigated case, many mistakes, one-sided views, and gaps are discovered, which have arisen in determining the separate preliminary and intermediate questions. Fortunately such interlocutory judgments are not binding on the historian, but allow of the completion, correction, and modification of opinions which once went too far; and in this I have been much helped of late years by the excellent historical works of Froude, Freeman, Stubbs, and others.

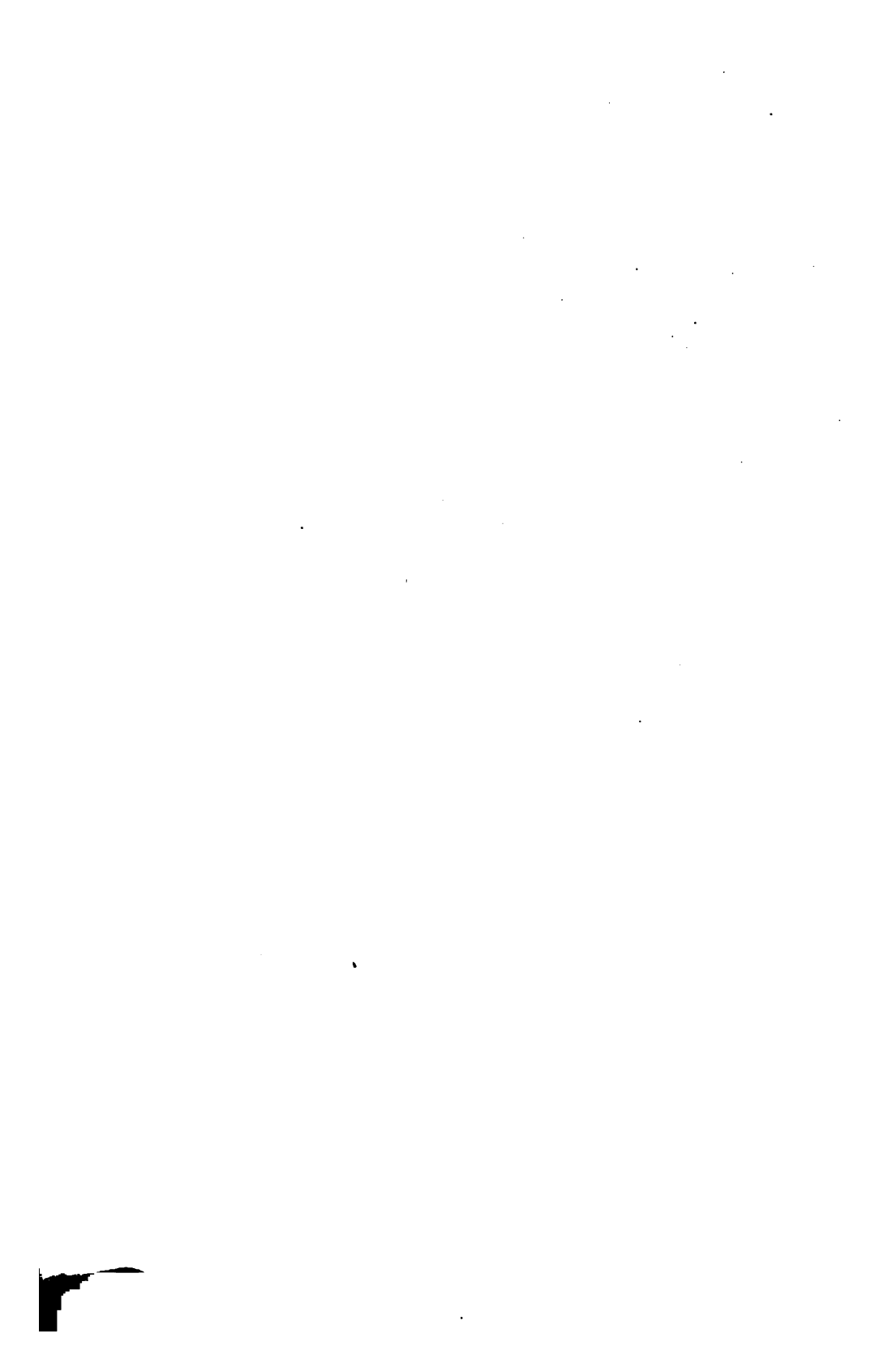
In another direction this history has encountered a grave difficulty, viz. in the copiousness of the matter.

A constitutional history must portray the reciprocal action continually going on between State and society, Church and State, constitution and administration, state-life and popular life, political and private economy, between the greatest and smallest interests. These are ever acting and reacting one upon another in such wondrous complications that a picture of the coherent elements, even when the moments of their activity are continually brought before the reader, can be but inadequately represented. In this constitutional history differs from a history of law, for the latter traces the development of the dogmas of private and criminal law, by quoting from legal documents and authorities, whilst the former deals



with the living body of the State in its origin, its life and its progress, and the successive and unbroken evolution of enactments which have remained in force until the present day.

But even in this imperfect form, the English constitutional history is pre-eminently suited to give a picture of the inner coherence of the various members of the state and society, on which the history of all constitutions and the fate of all nations is really based. In these reciprocal relations the history of former centuries returns to life, and becomes a mirror wherein are reflected the struggles of the present; but above all it must be regarded as manifesting the over-ruling Providence which guides the destinies of mankind according to right and towards the right. Every man who, with the inevitable partiality arising from a political, ecclesiastical or social standpoint, follows up the development of the British empire for a thousand years back, and strives in all earnestness to discover the connection of events, will be obliged to correct or amplify many preconceived opinions. The results of personal activity and experience are similar in the manifold relations of public life, in narrower and in wider circles; and it is just this habit of personal activity that has educated the English nation and its ruling class in political freedom, and has raised the political parties in the country to the capacity of ruling parties. Perhaps in later treatises I may succeed in portraying these reciprocal relations in a still simpler and more vivid manner, for in them lies the solution of that enigma of the European world—otherwise incapable of explanation—namely, how it comes that in one country the individual members of the State and of society appear to be in a state of progress, and yet the whole loses ground, whilst in another, the individual elements appear to be backward and at times to retrograde, whilst the whole is mightily advancing.



## TRANSLATOR'S PREFACE.

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THE author's world-wide reputation, both as a jurist and historian, was alone sufficient to justify the appearance of an English edition of his History of the English Constitution; but the preface to the German original furnishes a still more cogent reason for presenting this translation to the English public. The author there tells us that no consecutive history of the English Constitution has previously been written. Various epochs have, it is true, been treated by consummate masters, but there is no treatise extant, that has attempted in any way to describe the rise of our political system, and to follow it through all its varying phases down to the present.

It is the author's express wish that his preface to the German original, though primarily intended for German readers only, should likewise preface this translation; as therein are set out the causes that induced him to commence and bring his researches to a successful issue.

The work having been compiled fragmentarily and at different times, and having originally been devised to meet the practical needs of the German legislature, could not but exhibit some abnormal features; among them the especial stress laid upon the administrative institutions of the State, the county and the parish. The author was, moreover, obliged to express himself according to political and legal conceptions familiar to German jurists, and which diverge

more or less widely from English terms. Hence a free translation of the English terms into German had first to be made, a retranslation of which into English is far from easy, and in many cases might appear to call for explanation, the insertion of which, however, would have encumbered the text.

The author as well as the translator must accordingly beg the indulgence of the reader for any roughness or unevenness of style, which may blemish the original or the translation; shortcomings that could scarcely be avoided, as the author could only hastily revise the sheets.

At all events it will be of the greatest interest for English students of history to see how a foreign jurist, who has been much engaged with the reform of the judicial and administrative institutions of Germany, treats the ancient and modern development of the "Parliamentary Model State."

P. A. A.

LONDON, *November*, 1885.

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# CONSTITUTIONAL HISTORY OF ENGLAND.

## FIRST PERIOD.

### THE ANGLO-SAXONS.

#### CHAPTER I.

##### *The Anglo-Saxon Foundation.\**

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THE conquest of the British Isles by the Saxons, Angles, and Jutes from the middle of the fifth century has the character

\* With regard to the sources of this period, Lappenberg ("Geschichte Englands," vol. i. Intro.) gives the most exhaustive information. Compare also Gneist ("Geschichte der Communal-Verf." pp. 7-9). The laws in the following pages are quoted as given by Reinhold Schmid ("Die Gesetze der Angel-Sachsen," 2nd ed., 1858). Where special occasion demands, quotations are given from the official report of the Record Commission (Thorpe, "Ancient Laws and Institutes of England," two vols. 8vo, 1840). The several royal laws are quoted with the abbreviations used by Schmid, viz. Athl. (Æthelberht), Wht. (Wihtraed), In. (Ine), Alfr. (Ælfred), Edw. (Eadward the Elder),

Athlst. (Æthelstan), Edm. (Eadmund), Edg. (Eadgar), Athlr. (Æthelred), Cn. (Cnut). From the Norman times the *Leges Gulielmi Conqu.* also contain in the main only a collection of Anglo-Saxon rules of law. The so-called *Leges Henrici I.* are principally also only a private compilation from the later Anglo-Saxon legislation, dating from the middle of the twelfth century. The *Leges Eduardi Confessoris* also are a private compilation from various sources and traditions from the legislation of the later Anglo-Saxon times, and apparently dating also from the twelfth century. The Anglo-Saxon documents are quoted from Kemble's *Codex Dipl.*, vols. i.-vi. (1839-1846).

of a gradually advancing occupation. The disunited Britons, some of them grown effeminate, while others have become savage, are overcome after numerous battles with varying issue; the civic settlements, dating from the days of the Roman sway, fall into ruins; the old Roman culture disappears, and with it Christianity; the aboriginal population is either driven into the hills or reduced by oppression to a state of slavery or to the position of impoverished peasants. Hence in England those peculiar conditions are wanting which in Western Europe arose from a mixture of the Germanic races with a Romanized provincial population, with Roman culture, and with the Roman provincial and ecclesiastical constitution. On the other hand, the conquest had the effect of destroying the tribal bond that still prevailed in the home from which the conquerors came. The first settlements, indeed, appear to have been based upon the exodus of small tribes (notably the Angli), with wives, children, and servants, from the old home into the new. As colonization slowly proceeded new migrations continually took place (as in the colonization of the Marks in East Germany), in consequence of which the old tribes became mingled together, and the original family unions were widened by new settlers. The groups of conquerors thus welded together appear to have found their bond of union principally in the greater and lesser military chiefs, from whose office as leaders in war the royal dignity arose in later times.

After the occupation of the country a division of lands took place, in which the *hida*, *familia*, *mansus*, or plough of land (which, according to Kemble, amounted to thirty-three Saxon, or forty Norman, acres), was made the unit or smallest measure of land settlement, and, with certain rights of pasturage and woodcutting, was regarded as a sufficient basis for a peasant's household.

In many places the British population had already a distinct landed property upon which the conquerors entered. In

Of English historical works bearing on these times use has been made principally of Kemble, "The Anglo-Saxons in England" (1849), two vols. (translated by Brandis, from whom the quotations are taken); Sir Francis Palgrave, "The English Commonwealth" (1831, 1832), two vols.; Sharon Turner, "History of the Anglo-Saxons" (1799-1835), three vols., with the supplementary volume, "The History of the Manners, Landed Property," etc. New and important contributions for this period are also given by Freeman, "History of the Norman Conquest," vols. i., ii., iii. (2nd edition, 1870);

Bishop Stubbs, "Constitutional History," vol. i. cap. 1-8 (1874); and an exceedingly able and useful selection of legal charters and historical documentary evidence is furnished by his "Select Charters and Illustrations of Constitutional History" (2nd edition, Oxford, 1874). Of German treatises, a history of Anglo-Saxon law containing the principal features, by Conrad Maurer, "Münchener Kritische Ueberschau," vol. i. p. 47, ff., continued in vols. ii. and iii.; Phillips, "Geschichte des Angelsächsischen Rechts" (1825); Lappenberg, "Geschichte Englands," vol. i. (1888).

later times the continual feuds among the petty kingdoms everywhere hastened the dissolution of the family bond and the development of private property, with all its lasting effects upon the constitution and civilization of nations. Only in a few tracts of land in North Europe were soil and climate so inviting and so productive for the peaceful labour of tillage and pasturage, so calculated to produce attachment to hearth and home. From the beginning of the tenth century the expressions "*bôc-land*" and "*folk-land*" appear as the invariable equivalent of the *ager privatus* and the *ager publicus*. The rich store of Anglo-Saxon records proves conclusively that the rights of private property were early established, and that property could be transferred by title deeds. Just as certainly was there in early times great inequality in the division of property. The reason for this is chiefly to be sought in the existence of small armies which were slowly but steadily conquering, under their numerous captains and commanders, who at the division of the land received the greater possessions, which possessions in process of time were managed by the settlement upon them of smaller people, who rendered payment in kind. This inequality of property had already undermined the old position of the freeman. The ancient inheritance of freedom, the considerable weregeld, and the personal protection accorded the *liber homo*, were, indeed, continued to him, even when he possessed no land, down to the close of the Anglo-Saxon period. But in every other respect, the rising up of the greater landed proprietors over the class of the peasant proprietors, and the degradation below the line of freedom of the free-born men, without possession of their own, is increasingly manifest. The conditions of property among the Anglo-Saxons tended thus to a state of dependence, by means of loans of land and service, on the largest scale. The ordinary names for those who were in this state—*Folgan*, *Hlāfāta*—include both the settlers upon the land thus lent or let and also the personal domestic servants. But the state of service (*gesith*) thus created proceeds in two widely divergent directions.

This entrance into the sphere of personal service has quite a different meaning as applied to the household of the inferior warrior chieftains. When once a settlement has been formed, the honour attached to this service, and its connection with military and legal affairs, gives the retinue of the king a position so prominent as to be eagerly sought after by the landless sons of the great proprietors, and even by free landlords. The relation of service to the king forms more and more an especially honoured upper class, increasing with the growth of the royal privileges and of the realm.

On the other hand, this dependence, brought about by the settlement on farms held of private persons, is productive of a lower position, which sinks below the level of the old common liberty. This class of settlers are for the most part small farmers, intermingled even with bondsmen, and it has the position of a dependent and heavily burdened peasantry. Extant records show us how manifold were the ways of granting such a "fief," whether revocably or irrevocably, for years or for life, and with reservation of numerous payments (*gafol*) in kind or in money, in labour, service in the field, defined or undefined. The great landed proprietorships realized much from such settlements, and supplied themselves with the natural products and the services of which a great household stood in need, for the wants of private life as well as for the equipment of the troops. The dependence thus created became in fact hereditary, and increased in times of war, through the destruction of the free peasant farms, and in times of peace through the increase in the number of the landless members of families. In this direction social order appears in the Anglo-Saxon times to have advanced with even step. The law of property originating in later times under the name "*rectitudines singularum personarum*," affords us in the law affecting the Thane, in the rights of inheritance, and of those affecting the farm labourers, a picture of a firmly established state of society, exhibiting a deeply rooted dependence of the free-born classes on great landed proprietorships.\*\* In its forms of armament, administration of justice, and Church, the State is constantly acting and reacting upon these bases of property. Army, Law Court, and Church remain throughout the whole of the Middle Ages the three foundations on which the commonwealth is carrying out its work of change.

I. The first department, the *Military System* of the Anglo-Saxons, is based upon universal service. Under this is to be understood the duty of every freeman to respond in person to the summons to arms, to equip himself at his own expense, and to support himself at his own expense during the campaign. The impossibility of attaining a uniform fulfilment of this duty is at the root of all the changes in the social relations, and in the constitution of the Germanic races. After a fixed settlement has been entered on, the small peasant farm, barely sufficient to support a family, cannot possibly,

\*\* The laws of property are treated of at length by Conrad Maurer, in the "Münchener Kritische Ueberschau." R. Schmid's "Glossarium" v. Böcland, Folkland, Hid. Kemble, Anglo-Saxons, i. c. 2, 4, and appendix A, B, C. On

the older family constitution, see R. Schmid in "Hermes," vol. 32 (1829), pp. 232-264. On the land communities of the Middle Ages, see Nasse, "Das Englische Marken-system."



as a rule, answer this duty, and still less can it be fulfilled by the landless freeman. Among the Anglo-Saxons, as elsewhere, after the settlement a division of the militia, according to Hundreds, was organized, in which arrangement a remedy was to be found for existing evils. They were obviated in this way, that the Hundreds, instead of furnishing a hundred men, sent smaller contingents, and that in making the divisions the number of the hides of land was taken into account; that a landowner was allowed to send his sons and his followers to serve in his stead, and that the regulation of the duty of furnishing troops was left to the resolution of the National Assembly, and in process of time to the lieutenants of the king in the County Assembly. The Hundred therefore means, with regard to the constitution of the army, only an equal contingent within a greater unity; and this is the reason that in various epochs, as for instance under the reign of Alfred the Great, a new organization of the Hundreds took place. The Anglo-Saxon times never attained to such fixed and determinate rules of law as were introduced by the capitularies of the Carolingians. The sub-distribution was left entirely to the administration of the county, whence only a very unequal and faulty form of militia could proceed.

Accordingly, in the times of the Heptarchy, the individual chieftains were obliged to have recourse to other forces for the waging of their numerous wars, by detaining and reorganizing from among their free servants and followers an armed retinue ready to respond to their personal summons. All court offices had originally a warlike character. Prospects of booty, honour, favour, and reward induced even freemen to join such trains of followers. Besides the booty, gifts of folkland and grants of offices of trust were the rewards chiefly paid for services of this description, and thus there was formed round each of these little kings a first levy of tried soldiers, whose existence confined an appeal to the general military service of the people more and more to cases when the country was in peril. We first read in the laws of Ine of these warlike *Gesith-men* (with or without land of their own), whose increased *weregeld* indicates them as belonging to a class liable to military service in a higher sense; and in process of development these men become the still more esteemed class of *Thanes*. Analogous reasons in later times led to the greater landed proprietors in the united Saxon kingdom forming a warlike retinue from among their domestics, their under-vassals skilled in arms, and in some measure from among the free landed proprietors. At the same time the majority of the freemen were, to a certain extent, practised in arms, but this varied according to the position of the

districts. As a rule, the service of the freemen in times of peace was required by the Hundreds more for guard duties, the repair of castles, and the making of roads. The reorganization of the army by Alfred was not permanent, and after the lapse of a hundred years sank into a state of utter weakness, and at the close of the Anglo-Saxon period the ascendancy of a few powerful, warlike Thanes, with their armed followers, produced an oligarchical character in the whole of the constitution. (1)

II. The second department, the *Anglo-Saxon Administration of Justice*, in spite of the numerous accounts handed down to us, affords no comprehensive picture of the whole. In the developed constitution of the tenth century, however, we meet with judicial courts of the two following degrees.

The *Hundred Court* or *Hundred-gemôte*, meeting once a month for the narrow district of a commonalty (*Vicinetum*), decides the ordinary civil actions and petty criminal cases, and is the principal place for the solemn conclusion of contracts and testamentary dispositions.

The *County Court* *Shire-gemôte*, meeting twice a year, exercises a fuller criminal jurisdiction, decides quarrels between the inhabitants of different hundreds, draws in general within its jurisdiction matters in dispute between more powerful parties, and forms a periodical district assembly for the conduct of all public business in the county.

The parties appear before the court with numerous compurgators, *i.e.* persons prepared to swear to the truth of a statement; the employment of witnesses in civil actions was tolerably frequent, and suitors seem to have appeared frequently taking a part. A regular participation in such judicial proceedings, with their numerous judges and compurgators, presupposes an independent position which must have been very rare among the small settlers, many of whom possessed but a single hide of land. And yet a regular

(1) An enquiry into the constitution of the army leads to the negative result that there was no legal distribution of the burdens of military service in Anglo-Saxon times. Military service was the personal duty of every free man, and not a fixed burden, but one pertaining to the commonalty, and regulated according to extent of property. The much-vexed question, which has been discussed almost within the memory of the present generation, as to whether in the Anglo-Saxon times a "feudal system" existed, has its origin in mistaking a few unconnected elements for the whole. Grants of

land, and the rendering of military service by the grantees, existed already in Anglo-Saxon times, as did also the legal and police jurisdiction of the landlord over his tenants. In the same way there was a bond of allegiance between the king and his higher followers, between every master and servant, between the Hlāford and the Hlāfaeta; but the growing together and the consolidation of these relations into the English feudal system did not take place until the Norman times. For their more special formation under the influence of the monarchic power, see cap. ii. sec. 2.

attendance at judicial proceedings is the necessary preliminary of all legal knowledge ; he who is only present now and then cannot become and remain the depository of legal knowledge and of legal custom. Accordingly the great County Courts were, at their first authentic appearance, assemblies of the greater proprietors, who, in their capacity of regularly appearing, experienced lawmen, obtained the appellation of "Witan." A picture of old Germanic peasant communities forming a court in full assembly, under their chosen presidents, is not to be found among the Anglo-Saxon records. The inequality of the proprietorships has thrust back the smaller farmer into the position of a spectator in the large assemblies, and even in the small County Courts the judgment is generally left to a small number of "Witan."

These beginnings of a magisterial constitution are founded upon the natural basis of the ascendancy of the great proprietors. The Carolingian institution of select lawmen (*goabini*), appointed permanently by a royal officer, is foreign to Anglo-Saxon ideas.

The magisterial office in Anglo-Saxon times is remarkably vigorous in the matter of punishment. Blood vengeance appears only to have been permitted against the slayer with malice aforethought and the adulterer. The privileges and responsibilities of clan and family kinships assume a subordinate position where a breach of the peace has been committed. The system of composition, so far as payment of wergeld and penalty to the parties is concerned, appears to have soon become only subsidiary. Serious breaches of the peace are generally visited with capital or corporal punishments, while for serious as well as for petty offences, considerable fines under various styles and names were payable to the magistrates. Penal justice was thus, even in the Anglo-Saxon times, in intimate connection with the financial rights of the king, and in course of further development with the privileges attached to the private jurisdiction of the landowners. Out of the magisterial authority in criminal procedure there was formed a system of protective measures to secure the "maintenance of the peace." The householder is made responsible for those living with him, the landowner for all the occupiers of his soil, especially for their due appearance in courts of justice. The landless man who did not belong to the household of an established landed proprietor, was forced to enter a union called a "tithing." Towards the close of the Anglo-Saxon period, this "tithings system" developed into similar small unions consisting both of free men and of poorer people dependent upon the soil. At the same time these formed a police system, and acquired

a right of settlement, and thus incorporated the landless population either with the household of a Thane, or with the land belonging to a Thane, and to a community dependent upon him, or forced them into a tithing of free peasantry. (2)

III. The third division of the Anglo-Saxon life is furnished by the **Christian Church**—the necessary complement to the army and the judicial system. Just as the influence of the heathen priesthood in the new settlements does not appear to have been anywhere very important, so the conversion of the separate kingdoms to Christianity in the course of a single century (591–688) was effected without any material struggles or convulsions. The successful labours of the Scottish missionaries, who brought down from the north the faith of the British Church, were met from the times of Gregory the Great and St. Augustine onwards by the equally successful propagation of the Roman Catholic ecclesiastical system advancing from the south. In spite of the disunion that at first existed, Christianity found a fruitful soil in the peaceful inclinations of the new colonists; while the early entrance of the aristocratic classes into the clerical profession is a characteristic feature in England. The importance of the Church of the Middle Ages shows itself primarily in its protection of the weaker classes. The Church created the first beginnings of a legal protection against the sale and ill-usage of women, children, and bondsmen. It was the Church that first secured to the labourer his day of rest, his earnings, and an effectual liberation from slavery. She it was that founded the earliest schools for the upper classes, whilst the lower clergy and the monks were accessible to all alike for advice and instruction. She was the first to foster gentle manners, industrial pursuits, peaceful intercourse, and was the first originator of relief for the poor. The higher regard for the sanctity of marriage, the raising of the position of women—first in manners, and then in their private rights—are due to her influence. In the Law Courts the Church made her power felt by the frequent application of oaths, and by conducting the judicial trials by the ordeal of fire and water, which fell to the Christian clergy in the transition from heathendom. The Bishop appears in conjunction with the Lieutenant of the king, as the head of the county administration. And so the Church, steadily progressing, enters into the Commonwealth to fulfil those humane tasks for which there was as yet no room in the temporal constitutions of

(2) As to the legal jurisdiction of Anglo-Saxon times, compare Lappen-berg, vol. i. p. 581, *et seq.*; Phillips, pp. 166–210. The description of the offices and the districts (cap. iii. iv.)

refers to their various aspects. As to their further development under the influence of monarchy, vide *cap. ii.* secs. 2 and 3.

the Middle Ages. In all circles of public administration the *Clerici* are the indispensable medium for writing. Bound up with all classes of the population, and with all the interests of life, the development of the English Church, as regards its officials, its doctrines, and dogmas, has been more national in its character than the Churches of the continent. Nevertheless, the internal organization of the Church is true to its principles, as being an universal school. To perform its widely extended functions, there was formed a peculiar class for intellectual labour, which, like every other free labour, needs property; and therefore in the Middle Ages it needed landed property, without which the Church would have remained in a servile position, and incapable of fulfilling its vocation. The ecclesiastical constitution accordingly assumes in this most national of all Church institutions the same external form as in the rest of Christian Europe. A school for a nation can only be conducted by spiritual superiority, and this demands, on the part of officials, submissiveness and devotion to their profession,—the first example in the Germanic life of a class of professional public functionaries. (8)

Such are the political forces which, continually acting and reacting upon the inequality of property, remodel those class relations to which I shall again revert in Chapter VI. The bearers of arms maintain their dominion over the soil, and become the landowners. The landless freemen come into a lasting and actually heritable dependence upon the land. Throughout all degrees of property there runs a disposition to create dependences which strives after a legal recognition, and gains it in the following way.

The state of dependence in which the poorer classes were, was formally recognized by the king and the general

(8) We shall revert to the more important of these relations under the head of Ecclesiastical Administration (Chapter V.). As to the outward progress of the conversion, *vide* especially Lappenberg, i. 132-205. The propagation of the new doctrines proceeded from above to below, making its first appearance at the court, and then through resolutions of the national assembly, which was generally appealed to, and which decided by a majority of voices. With regard to the main characteristics of Anglo-Saxon heathendom, see the exhaustive essay of Kemble, i. cap. 12. The effort made to replace as soon as possible the few foreign missionaries by native bishops is worthy of note. "It is owing entirely to the admission of natives among the

higher clergy that it became possible for the Church of the Anglo-Saxons to become so soon a national one, that the Liturgy, Ritual, Prayers, and Sermons were so soon given in the German tongue, and found their way to the heart of the people. The retention of the Germanic proper names, the peculiarity of the Anglo-Saxon calendar and its feasts, the small influence exercised by the Roman Ecclesiastical Law, the development of the national language by the Ecclesiastics, the weakened influence of Rome upon the princes of the realm, are the peculiar and intimately connected advantages of a Church, truly richly endowed by reason of its former deficiencies" (Lappenberg, i. 168).

assembly of the realm and became a principle of law. The relation between Hláford and Hláfæta was already a complete portion of the Anglo-Saxon legislation. (In. 89, 50, Alf. 87, 42; Athlr. i. 1, ii. 4, 7, iii. 5, iv. 1; Edm. iii. 7; Cn. ii. 29, 82, 78, 79.)

Higher services rendered in the militia and in the Law Courts then led to the legal recognition of a higher worth or station—to the idea of Thanhood. The direct expression for the "worth" of a man is the "Weregeld," which was fixed in the proportion of 200 to 1200 shillings; that is, the Thane was estimated at six times the rate of the mere free-man. By multiplication of these, further sums were arrived at for the Ealdorman and the Bishop. As the legal system of these times is primarily based upon the legal protection that a fine affords, a higher rating was equivalent to the recognition of the right to a higher class or rank. Hand in hand with these two relations is developed the foundation of a manorial system. The householder and landlord has the actual power to dismiss his *gesith*, and to take away from his tenants their grants, whence there results a right accorded to the lord of deciding upon the disputes of his *gesith* and his tenants. Recognized by the authority of the State, the domestic *Imperium* becomes a regular jurisdiction. With the increasing power of the magnates, further royal privileges pass to the landlords, and in later times also a petty criminal jurisdiction. Amongst the Thanes, again, certain greater Thanes are distinguished from the others, as having large territories and armed retinues, and being in possession of the high state offices, as well as of the lay dignities of the Ealdormen. These, together with the Prelates, compose, in Anglo-Saxon times, the legislative councils of the realm. Just as the county assembly in its executive capacity had become limited to Thanes and a few minor elements, so a similar limitation in a far higher degree took place in the council of the realm. The Anglo-Saxon Gemote, the so-called "Witenagemote," is a representation of the masses of landed proprietors corresponding to the system by which they fulfil the functions of the State; that is, it is determined by property, office, and royal appointment. In the last century of the Anglo-Saxon period the great proprietorships had attained such an ascendancy as to make the position of the throne vary with the period and with the character of its occupier, and the exercise of all royal rights often appears, as a matter of fact, to be the right of the oligarchic Witenagemote.†

† As to the degrees in the different classes, a more exhaustive account will

be found in Chapter VI., I only here refer to what is necessary for the

understanding of the offices. In the Laws of Ine the *Gentithundman* makes himself at first conspicuous. It is only since the time of Ælfred that the dignity of a Thane appears in connection with landed property to the extent of at least five hides, which carries with it a "Weregeld" of 1200 shillings, and the rank of a *Twelfhyndeman*. I conclude from a combination of numerous indications that this is connected with the establishment of altered military arrangements, according to which the king prevailed upon the majority of the great landlords to pledge themselves to him to obey his personal summons; for which the honour of a royal Thane, the appointment to the office of *Shir-gerēfa*, etc., as well as the further advantages resulting therefrom, such as favours and honours, were a sufficient equivalent. The title of "Thane" now becomes applicable to the royal servants, and extends from the highest offices in the court down to the smaller offices appertaining to the county administration and the royal demesnes. Moreover, those having the right to exercise a private jurisdiction, belong by virtue of this right to the class of Thanes, because their civil and police powers are now regarded as royal offices. The preponderating influence in this arrangement was the regard paid to public office and a public calling, and not to mere amount of property. That this was the leading idea attached to the

complex notion of Thanhood is shown by—

1. The etymology of the word, which expresses (together with the word derived from it, *thegn*, to serve) the *serviens*, or *minister*. This last is the usual translation in the old Saxon records.

2. In later times any kind of official position was so naturally connected with the word "Thane," that loss of Thanhood was used as a synonym for dismissal from a royal office.

3. Even where the possession of five hides is mentioned as being the basis of Thanhood, the reservation is added that the following things are further required: a church and a kitchen, a bell tower, and a seat in the castle gate (which is equivalent to a personal jurisdiction, *saca et soca*), and a special office in the king's hall (of lay rank, cap. iii., Schmidt, 381).

4. That the stipulated service forms the decisive point is further shown by the equality subsisting between all Thanes until the close of the Anglo-Saxon period. The great Thane with princely possessions is a *Twelfhyndeman*, and is no more than the simple county Thane with five hides of land. The Anglo-Saxon legal phraseology has no special term for distinguishing the great Thanes. When it is necessary to single out the magnates, the denotation "Royal Thanes" is used with a certain emphasis, in order to signify the important royal office they hold.

## CHAPTER II.

*The Anglo-Saxon Monarchy.*

FROM amidst this reconstruction in the system of property and freedom, we see in England the regal power going forth,—the most magnificent civil creation of the Middle Ages. Among the most nearly related continental races, in their old dwelling-places, among Saxons, Frisians, Holsteiners, Hadlers, and Dittmarshers, we find in those times no regal sovereignty. Its appearance among the Anglo-Saxons must be accounted for, not by national peculiarities, but by social conditions, which arose from the settlements upon conquered territory. Among the first generations, too, we do not as yet find a kingship. The conquering expeditions had certainly a chieftain at their head, who belonged to the families famous in war (*nobiles*); and in the conquered country we find the successful commander at the head of the army which has seized the territory. His name was associated with memories of victory, with the acquisition of the present dwelling-place. When the land was divided the lion's share fell to him, as well as the spoils of the vanquished British chiefs. In like manner, as possessions became hereditary, the transfer of the ducal dignity to the son was looked upon as a natural arrangement. Such a condition of things was found even among the Republican tribes of the continent. Actual kingship begins to exist—firstly, so soon as the dignity of the chieftain appears not only in the leadership of the army, but when it becomes a comprehensive supreme power, including the office of magistrate, of protector of the peace, of defender of the Church, with the highest control of the Commonwealth in every department; secondly, so soon as this highest dignity has become recognized by the popular idea as the family right of a high-born race. Directly both these conditions co-exist, the new idea shows itself in its new name. After gaining great victories, Ælla, of Sussex (514–519), was the first to adopt the title of “Cyning;” and this example was gradually followed by the other chieftains, down



to the petty potentates who ruled over a tract of country hardly as large as a county of the present day. The step which exalted the ducal dignity, until then recognized as a martial title, to the permanent position of supreme power, was, regarded from without, of no great importance. The head of the army in time of war, becomes the head of the government in time of peace; that is, the organization according to which the soldiers assembled under their leader, becomes the model for the new monarchical state.

The social conditions which regulated this new state of affairs have been indicated above. Together with the definite development of private property, the principal military and legal offices are transferred to a class of great landlords, which class in this way gains a predominant influence in the commonwealth. The graduated values of the landed properties gives the upper classes a separate position with regard to "Weregeld" and fines, puts them on a different footing in the army and in the Law Courts, puts a different value upon their oath, and accords them a different share in judicial proceedings. The ever-increasing difficulty of obtaining justice against the powerful, the class interests which pervade army, Law Courts, and the system of the maintenance of the peace (and later also the Church), create an idea that the old confederate constitution is no longer sufficient for the freeman. Under such conditions the chosen officers of the State become, wittingly or unwittingly, the representatives of the interests and the privileges of the upper classes, and develop a tendency to use their power for the exclusion from justice and oppression of the lower classes. In the burden which military duty imposed upon the small landowners, and in the numerous duties of tenure and service, means for this oppression were ever present, and were increased by manifold circumstances. War and disaster drove the small independent landowners from their farms; the Hundred was broken in upon by the lords of the manor and by dependent communities, and the separate allodial peasants became less and less capable of protecting themselves and bearing the common burden. In such a state of affairs the weaker classes would necessarily be in a better position when a higher impartial power appointed and controlled the civil and military officers. Only by such a power could the initiative be taken for the measures which were now necessary for the protection of the unrepresented classes. The exclusion of the small landowners and of the landless from all the greater assemblies lessens their interest in the life of the confederacy, and inclines the masses to subject themselves to one great distant lord, rather than to numerous, powerful neighbours. In this matter the Middle Ages were guided by

an empirical tact. If the supreme ruler of the commonwealth was to be exalted above these class interests, it was necessary that his ruling position should be made a permanent dignity in his family, which should be independent of the favour of the dominant classes, and devoted to the lasting welfare of the community; and as a rule the king was inclined to this from the feelings inspired by his high calling. In contrast to the ancient world, in the Germanic world the hereditary kingship raised the "State" above social interests, and gave the permanent and highest duties of the State a permanent representative. And therefore it is that, among the Anglo-Saxons, kingship was upheld by the attachment of the weaker classes, and became bound to the whole community by a mutual bond, which of all the creations of the secular State has endured longest and most firmly.\*

The honorary prerogatives of the kingly office are next formed in the following way. They resulted from the idea that the embodied authority of the State, if it is to stand above the community, must be itself the undisputed head of the society. Accordingly the king has the highest grade of "Weregeld," viz., in Mercia 80,000 sceatts, equal to 7200 shillings, or 120lbs. silver; as high, therefore, as the "Weregeld" of six Thanes or thirty-six Ceorls. In other districts the simple "Wite" of the king is apparently not higher than that of the archbishop; but the amount of the royal "Weregeld" is doubled by the "Cynebot" of equal amount, which is demanded, not by the family, but by the whole nation for the life of "its king," thus giving expression to the idea that in reciprocal possession the king belongs not merely to his family and his class, but to the whole community and the nation at large. The next-of-kin of the king are also, by the simple "royalwere" and by larger contributions (Cn. ii. 58, Appendix iv.), ranked above the Prelates and Thanes, and form, under the name of "Æthelingi," the only legally recognized hereditary nobility of the Anglo-Saxon period. The early recognized capital punishment for regicide, and for har-

\* As regards the origin of the Anglo-Saxon kingship, see the clever monograph of Allen, "Inquiry into the rise and growth of the Royal Prerogative in England" (1830), in which the historical dates have been carefully collected. But the appearance of the treatise at the time of the Reform Bill, and the abstract arguments employed, have caused the author to entirely mistake the authenticated development of a king from social causes. In the background one can perceive in this author the idea of

usurpation and a continual dislike of monarchy; everything that is immature and anomalous in the development of kingly power he accordingly places in the foreground. Turner, on the other hand, is unprejudiced, "Anglo-Saxons," Supplement (iv.) p. 262. For the historical facts as to Ælla, of Sussex, *vide* Bede, "Ecclesiastical History," i. 15; "Saxon Chronicle," anno 449-495; Lappenberg, i. 566. The etymology of the name "King" is dubious.

bouring seditious vassals of the king, belongs pre-eminently to the class of political or magisterial prerogatives. A higher degree of "Weregeld," and a fine for the king's vassal, and the higher position of the vassal as "compurgator," create at once a social prerogative, and a recognition of magisterial authority. An especial protection extends even down to the godchild, the groom, and the man whom the king honours by deigning to drink in his house. To the social side of the kingship belongs finally the formation of a Royal Household, the four chief offices in which, as in other Germanic kingdoms, are those of the chamberlain, the marshal, the steward, and the cupbearer.\*\*

The rights of sovereignty in the State are more slowly developed than the prerogatives of the king. To designate him as the highest official in the realm, the terms, "Hláford" and "Mundbora" of the whole nation are used (Chron. Sax. anno 921, and under Eadward the Confessor). Whilst the word "Hláford" expresses the lordship over the whole nation, which has to swear faith and allegiance to him, the term "Mundbora" expresses a protector and guardian, "*defensor et patronus*." The indefiniteness of the appellation is in keeping with the facts. It was indeed a process of slow formation in which the royal sovereign rights of later times were not yet sharply defined. An analogy with private lordship still exists everywhere; just as the oath of fealty taken to the

\*\* The honorary prerogatives of the king belong pre-eminently to the social side, and it is accordingly not by mere chance that among the Celts in England, as on the continent, court officialism plays a more important part. Nationality, and the strong ascendancy of the great landed proprietors, combined to make the kingships there find pleasure in posing as the heads of great and noble households. The pedantic importance with which the law of Wales fixes the rank and the perquisites of the twenty-four court offices, according to their position at the king's marshal's and vassal's tables is very characteristic. Kemble's "Anglo-Saxons," ii. cap. 3, contains a chapter on the king's court and household. The chamberlain appears under the name of "Burthegn," "Hordere," "*Cubicularius*," "*Camerarius*," and "*Theaurarius*." The marshal is known as "Steallere," "Hornsthegn," "*stabulator*," "*strator regis*." According to the literal interpretation of the term, "overseer of horses," his duty was to superintend everything connected with the royal

equipment, and thus he had an especial authority over the warlike followers; the frequent mention of it points to a certain importance attached to this court office. The steward ("*Truchsess*") appears as "*dapifer*," "*discifer regis*;" the Anglo-Saxon name was "Discthegn." The cup-bearer is found only in Latin records as "*pincerna*," "*pincernus*." The smaller offices are so incidentally mentioned that from this single fact alone their small importance can be estimated. But even the higher offices are only honourable dignities for the "great Thanes," to whom the king, according to circumstances, also entrusts the command or his troops, or to whom he gives some high position in his council; but with no court office, as such, are specified State duties connected. The position of the "great Thane," and of the high official of State or Court, is frequently united in one person; but everywhere the signatures of the Prelates, of *Duces* and *Ministri* (Thanes), appear as the proper constituent parts. A title derived from a court office only occurs

king is word for word the oath of service taken by a private man to his Hláford. Nevertheless very important changes in the social order in the army, and in the court of justice, as well as in the Church, originate in the power of the Sovereign.

I. *The Military Supremacy* was already contained in the old Ducal dignity, as being the highest command in the army, and is undisputed throughout the whole of the Anglo-Saxon times. Both before and after the union of the kingdoms the king fights in person at the head of his army, in the innumerable battles recorded in Anglo-Saxon history. Next to the king, Ealdormen appear most frequently as commanders representing him; his place is also often filled by a marshal (*steallere*), or some other great Thane. A general viceregency of an Ealdorman includes also the delegated command of the army. With this exception, there cannot be found, in the whole Anglo-Saxon period, any trace of the active command of the army being attached to any office or possession. Separated, again, from the leadership of the army is the power of deciding as to war and peace, and of regulating the distribution and equipment of the contingents. The decision on these matters originally rested with the people, without whose assent no national war could be entered upon. In later times, too, the king determined on such matters in the national council, which in the small kingdoms is identical with the county assemblies. After the consolidation of the great kingdoms with their subdivisions, the right of deciding the distribution of the contingents, under the direction of the royal governor, falls to the county assembly. (1)

The traditional limitations of the military power have no bearing upon the armed courtiers and personal vassals of the king; to summon them to his standard was a personal right, while their equipment was the business of the "Steallere." In the place of the old broken-down militia there stood now a force better versed in arms, equipped, and for the most part

occasionally in the case of a few Thanes, and only among such as are not invested with the higher rank of Ealdorman (Dux, Comes) in the central administration, the signature of the Ealdorman always preceding those of the others.

(1) The *military sovereignty* must be distinguished with regard to its later development according to its three component parts.

a. The *decision touching war and peace* was from ancient times the concern of the people, wherever a real "national war" was to be undertaken.

b. The *decree as to the distribution and equipment* of the contingents was

left to the individual shires in which the governor sat in council with the county assembly. The administrative character of these debates, regarding amount and distribution, appears also in the laws (Athl. vi. 32. sec. 3).

c. The *personal command* of the national army. From the supreme command over the army proceeds the right to appoint all the other leaders. The punishment for omitting to join the army varied according as the king was present in person or not. In the former case the disloyal soldier might forfeit his property and his life (Athl. v. 28, vi. 35; Cn. ii. 77).

maintained, by the king's household, and by those of a few great lords who had the means of provisioning their men during a campaign. They were bound to their lord by a personal oath, which had not yet any connection with a fief of land, but which was only taken "on condition that he keep me as I am willing to deserve, and fulfil all that was agreed on when I became his man, and chose his will as mine." Herein there was only the first step to the later "feudal system." The *Gesith*-man may be a free landed proprietor, owner of a grant of folkland or loanland under very various conditions, or he may be landless and dependent solely upon the maintenance he receives in his lord's household. We perceive in the numerous feuds of the petty kingdoms with each other the wars carried on by a retinue of followers, and consequently these armed followers themselves attained side by side with the decay of the old land militia a wider extent and importance. The unsuccessful struggles with the Danes showed the unwieldiness and occasional uselessness of the old national array so clearly, that in the combats for deliverance, under Ælfred the Great, the personal organization by the king is throughout a prominent feature. The relation of personal service to the king, "*Thaneship*," extends by degrees to all possessors of five hides and upwards. From these times we meet with many occasions upon which, without any resolution on the part of the National Council, the people willingly followed the personal summons of the king. (1\*)

The military constitution of the national army and that of the royal retinue became in this way to a certain extent fused. Decisions touching peace and war could no longer be com-

(1\*) Originally, the position of the personal followers and of the armed courtiers was quite different from a legal point of view. Immediately after a conquest, the flower of the warriors, who under their leader or lord had won the victory, remained, in peace also, the nearest surroundings and companions (*comites*) of their chieftain. As the kingdom grew, the possibility, and with it the desire to increase the number of the followers grew also stronger (Kemble, i. 142). But seeing that the king chose his Ealdormen and *Geréfas* from amongst his nearest followers, and appointed them to posts of confidence, the "follower-system" became fused with the supreme offices, and formed the later "*Thaneship*." In process of time this double relation was sure to react upon the altered position of the popular decisions con-

cerning war and peace. The carrying on of war was in the ninth century no longer compatible with a war system, dependent on the resolutions of a national council, and on the innumerable and separate transactions of the county assemblies. In the complete ruin of the State, out of which Ælfred the Great raised his people, the observation of the old constitutional forms became impossible. Ælfred introduced a system of successive service, according to which in long campaigns the soldiers relieved each other; he built magazines for the provisioning of the army, at the expense of the State, and framed new regulations for the conduct of marine warfare and for the defence of fortresses. But the question of the extent of these arrangements has never been definitely settled.

pletely in the hands of the national council, although that council was, as a matter of fact, almost always consulted, and claimed at least the right of giving or withholding its consent when there was any question of exceeding the customary time of service, of entering upon winter campaigns, of naval preparations, and wars of conquest in distant parts, or generally of any unusual services. Similarly, in the county assemblies, the disposing powers of the royal officers in equipping the contingents had to be enlarged. In two generations after Ælfred's day, peaceful inclinations again had the upper hand; the kingdom again became powerless to resist the Danish invaders. Bold adventurers from among those northern warriors soon gain the position of great king's Thanes. The landed proprietors are only too ready to abandon the real war service to the newly formed retinues, who had been gained over by the gifts of offices and grants of folklund. The heavy-armed, experienced soldiery now consist for the most part of landless men under the command of great Danish Thanes. Already under Cnut a standing guard of three thousand housecarls appears—a class of soldiers with articles of war of their own, and completely severed from landed property. But as this institution, standing as it did in complete contradiction to the proprietary, financial, and social conditions then existing, could not possess stability, it soon fell to pieces. An ever-recurring feeling of insular security prevented any lasting reforms in the military organization, either by a definite distribution in proportion to amount of property, or by regular arrangement and drilling of the masses capable of bearing arms. And this is what finally brought the Anglo-Saxon kingdom to ruin. The energy which, among the Langobardi, distributed military service on the principle of the Roman centuries according to landed and movable property, or which, as in the Carolingian constitution, gave the State an immediate right to a fully equipped man for every four or five hides, was unknown to the Anglo-Saxons. This state of things explains the intricacies which in later times arose whenever a military summons was really issued (as, for instance, in the fatal year 999), for the allotment of the contingent in each district and sub-district could be disputed. Even the grants of folklund were not utilized for the purpose of regulating a certain proportion of men. The Anglo-Saxons had neither a perfected form of the "beneficial" system nor a "seniorat" (*vide* p. 79). The folklund was partly given away as an Allod, and partly revocably granted, with various burthens attached, but everywhere with the reservation of defence and guard duty, but not charged with supplying any fixed number of shields as an actual tax. Very numerous

grants were made to the great Thanes in return for services done, and in expectation of services in the future; they were an expression of favour, but no basis for fixed war service. This is the most characteristic expression of the laxity under which the Saxon military system generally suffered. (1<sup>b</sup>)

II. The Judicial Supremacy of the King was the most important of the permanent powers which accrued to the chieftains in the transition from the old dukedom to the regal dignity. As "Mundbora" of the whole nation, the king was the supreme judge in the land, with power over limb, life, and property. The royal judicial office, however, still retained the formal character of the Germanic magistracy. It included the right of "regulating," of "administering," and of "executing," but not the right of "pronouncing the sentence," which belonged to the members of the community. In the united kingdom it was impossible for the hereditary supreme magistrate, in consequence of the extent of his territory, to sit in judgment in the old traditional places of justice (although instances occur of the exercise of this right); but the legal supremacy in its regular course displays itself in the ruling power which appoints the Ealdormen and Shir-gerêfas as royal justiciaries in the people's courts, and commissions these again to appoint the witan who find the judgment. As protector of the weaker portion of his subjects and of the general freedom, the king provides a speedy course of justice, and facilitates the prosecution of rights, by the frequent holding of court days in the subdivisions of the counties (Hundreds). The Hundred Court, which exists from the tenth century, appears in England as a branch of the County Court instituted by later positive arrangement. In order to shorten the way for litigants, to dispose of the ever-increasing mass of legal business, and to render it possible for the poorer freemen to fulfil their duties without being overburthened, the less important matters were delegated to a local court, held every month, which sufficiently accounts for the indefiniteness in the limits of the jurisdiction of the

(1<sup>b</sup>) From the military rights of the king follows also the building of castles. It was of great importance to utilize at stated times, for such warlike purposes, the small freemen, whose services in actual warfare were seldom required. We find the same transition in the Carolingian legislation (Carol. ii. Edict. Pistense, anno 864, c. 27. vol. i. 495). "*Ut illi qui in hostem pergere non potuerint, juxta antiquam et aliorum gentium consuetudinem ad civitates*

*novas et pontes ac transitus pabulorum operentur, et in civitate atque in marchia vacatas faciant.*" The system of fortifications in the Anglo-Saxon times was, in consequence of the difficulty of providing an adequate garrison, very faulty, and eventually, when the times of danger were over, always fell into decay. But no exclusive right of the king to the building of castles can be proved.

County Court, and its position as a superior tribunal with respect to the Hundred Court, and for the presidency of the Shir-gerêfa in both. It is further the king who allows the Manor Courts to enlarge their jurisdiction over petty criminal offences, who extends this jurisdiction to certain free allodial possessors, and who lends to the Manor Court the character and authority of magisterial power, besides defining and regulating the relations between private and public courts. The position of private magistrates as "Thanes of the king" prevents such rights as reside in them from being changed into mere rights appertaining to property, towards which result the interests of the landed classes were ever urging them. It was just these interests of the upper classes and the attachment to custom which jealously guarded the traditional jurisdiction of the courts. Though the royal judicaries were only representatives of the king, the king was not allowed to arbitrarily hold his court in rivalry with theirs; but his province was merely to act as subsidiary to the others, supplying deficiencies in cases of a failure of justice, or where, from the high position of one of the litigants, an impartial administration of justice could not be obtained or expected from the County Court. This subsidiary position is most definitely laid down in Eadgar, iii. 2: "Let no one go to the king on account of a suit, except when his right has been denied him in the court, or he cannot attain to his right" (so also in Cnut, ii. sec. 17). It is the old principle, seen also on the continent, that when the lower magisterial powers refuse to do justice, the higher should interfere to compel its being done. In this sense "the king in the national assembly" appears as the highest judicial tribunal in the land, in which capacity he deals with the failure of justice, and judges powerful litigants; that is, he appoints, according to custom, a number of impartial "Witan" to find upon the question of Right; analogous to the manner in which Ealdormen and Shir-gerêfas in the Hundred Courts appoint judges out of the number of those lawmen or suitors in the county privileged to attend the court. In the later laws it is laid down as a universal proposition that "no one has any jurisdiction (socne) over the king's Thane, but the king alone" (Athlr. iii. 11); which, from the numerous significations of the word "socne," may be understood to mean, that over the great Thanes in the Witenagemôte, against whom it would, moreover, be difficult to obtain justice in the country, the high jurisdiction of the king in the Witenagemôte should at once be exercised.—In the province of criminal jurisdiction especially, the assistance of the legislature was early needed to restrain blood-vengeance and to



improve the method of proof by compurgators, who, after the tribal constitution had become dissolved, were chosen very irregularly from amongst neighbours, whom the powerful noble can find only too speedily, but the poor man only with the greatest difficulty. At this point the kingly power, at an early period, shows itself active in affording the protection of the law to the weaker suffering under the oppression of the stronger. Numerous laws were directed against private feuds. Certain of the compurgators were nominated and summoned by the royal bailiff; and thus inequality in degrees of power were in some measure obviated. For breaches of the peace we early meet with an extensive system of punishments inflicted on life and limb. Breaches of the law led to an extended system of fines for the protection of the person, of honour, of domestic authority, and of property. And here, finally, the royal judicial supremacy appears in the form of the privilege of pardon, but only so far as it is opposed by no private right to satisfaction (Wihtr. 26; Ine 6, pr. sec. 1; Alfr. 7, pr.; Athlst. vi. 1, secs. 4, 5; Edm. ii. 6; Edg. iii. 7; Athlr. iii. 216; Cnut, ii. 67). In Edg. iii. 2 it is generally laid down that where any one finds the judgment unduly hard, he may appeal for clemency to the king. (2)

(2) The legal power of the kings had become already established in the small kingdoms long before they became united into larger principalities. This legal power, however, only comprises the right to hold a court. The pronouncement of the sentence by members of the community constitutes during the whole Anglo-Saxon period a part of the "*ordo judiciorum*." The royal judicial supremacy shows itself in practice in the following points:—

a. In the right of appointing the Ealdormen and Shir-geréfas as judges. These officers exercise also a decisive influence upon the appointment of the judicial committees of the community. In the first place the agreement of the parties decides; failing that, we never hear of a selection of judges by the community, because, by reason of the inequality of property possession and from the class interests which were dominant in the great courts, there was no room for it in proceedings in which the mass of the freemen only took part as spectators. In criminal proceedings, however, the accused participated in the selection.

b. As supreme judge over "*liberi*

*homines*," the king allows the Manor Courts also a judicial power. In this sense the lord of the manor was royal "Thane" in his especial capacity of magistrate. The magistrate himself is liable to a fine for disobedience (Athlst. iv. 7), and is, together with the Geréfa, nominated as official recorder in quarrels concerning barter and exchange (Athlst. ii. 10, pr.). The Land-Hláfard has to take care of stolen cattle until the owner is found (Edg. iv. 11; Athlr. i. 3, etc.). The *scene* of the private individual cannot extend over a royal Thane as a royal officer; at least this may be the dubious sense of the passage referred to above (Athlr. iii. 11, "*nān man nāge scene ofer cynges pegen, buton cyng sylf*").

c. As a matter of course the king appoints the local justices on the royal demesnes, as well as on those portions of the folkland which have remained under his immediate control, and in privileged districts also, whilst he accords many exemptions in his capacity of supreme magistrate.

d. The king as magistrate directly interferes where his appointed judge has neglected his duty (On. ii. sec. 17,

III. The Police-supremacy of the King proceeds from his position as "the highest maintainer of the peace." This peace-controlling power is the outcome and extension of the military command and the criminal jurisdiction, with which latter it is in England even at the present day allied. By the grant of the royal protection, special persons, places, and times became so hallowed that any violence done them was visited with condign punishment; and where a breach of the peace would have been committed, according to the law of custom, the punishment was increased, because of the "special peace of the king." The special laws concerning peace extend—

(1) To certain places: to the palace of the king and its surroundings (Athlb. 3, 5; Ine, 6; Alfr. 7; Cn. ii. 59); the residences of the upper classes, and, under other names, those of the lower classes as well, but more especially as "Cirik-frith" to churches and monasteries.

(2) To certain times: to the time when the militia is summoned (Alfr. 40, sec. 1; Cn. ii. 61); to the popular and court assemblies (Athlb. ii. 8; Athlr. iii. 1; Cn. i. 82); to market-meetings, meetings for taxation, and guild-meetings (Ine, 6, sec. 5; Athlr. iii. 1); to the coronation day of the king; and, with regard to the Church, to fast-times and fast-days (Alfr. 5, sec. 5, etc.).

(3) To certain persons: widows (Athlr. v. 21; vi. 26); nuns (Alf. viii. 18) and the whole clergy; apparently also to the possessions and personal property of the clergy (Athlb. 1; Edw. Conf. 1, sec. 1). Moreover, the king was accustomed, on ascending the throne, and on special occasions, to proclaim "general peace orders," which primarily were nothing but a confirmation of the *lex terræ*, according to which breaches of the peace were punishable in the popular courts by customary law. The consent of the National Assembly, which usually accompanied it, the solemn vow taken by the powerful nobles present, the enjoining of their official duties upon the royal governors, bailiffs, and lords of manors, gave to these proclamations of peace a heightened power, which was nevertheless again forgotten in troublous times, thus necessitating perpetual repetitions. In the course of the Anglo-Saxon period the king's peace took the place of the common, or people's peace (*volksfriede*), which once proved the basis of social order. The king was thereby authorized, with the consent of the National Assembly, to reform the old system of composition, to threaten heavier offences with punishment of life and limb, outlawry, and forfeiture of estate; to abolish

cit.; Edg. iii. sec. 2, cit.; Athlst. ii. 3). The purely subsidiary position of the royal right of decision was still recog-

nized at the beginning of the Norman epoch as customary law (Will. i. 43, Legg. Hen. i. 34, 6).

blood-vengeance, and, by means of bail, to secure the appearance of the guilty parties before the court. In all these directions the Anglo-Saxon period makes comparatively speedy progress. From the position of the highest maintainer of the peace was deduced a regulating power, which, without the consent of the National Assembly, created (beyond the province of ordinary breaches of the peace and breaches of right) new offences. For these heavy fines were fixed, whenever the judges recognized in them a breach of the proclamation of the royal peace. (3)

The blending of the office of supreme maintainer of the peace with that of commander-in-chief leads further to a union of the organization of the militia, its institutions, its districts, and its officers, with the objects pursued by "maintenance of the peace." The summons of the array may take place in the counties, even in times of peace, for the purpose of pursuing and apprehending peace-breakers (Edw. et. G., sec. 6; Cn. ii. 2, 29; ii. 48, sec. 6). The hundreds and tithings of the national militia are made responsible in the person of their *præpositi* for the maintenance of the peace; that is, for the arrest, safe-keeping, pursuit, and denunciation of peace-breakers. An important institution of this character was, moreover, that which compelled dangerous characters to find security for their good behaviour (Edm. iii. 7, sec. 1; Edg. iii. 7; Athlr. i. 4; Cn. ii. 25, 30, 38). Further still, landless persons were obliged, under threat of the withholding of legal protection, to join a "tithing," i.e., a small community with a responsible head, "*præpositus*," "head-borough," or to seek some landowner as their lord, who would guarantee their appearance before the court. As a general principle of law this is first laid down in Edg. iii. 6: "And

(3) The police power is a development of the legal and military powers combined, out of which latter proceed the legal grounds, the forms, and the means of constraint appertaining to the maintenance of the peace. From the power of punishing is developed first the idea of a preventative power. The right to command peace by means of personal orders lay in the military command of the king. Among the warlike tribes of the continent the notion of military service and punishment in default, which was part and parcel of the military organization, was extended to the province of law, and led to an enlargement of the powers of the magistracy. In England peace-jurisdiction is primarily the outcome of the judicial

power and the duty of protection (*mundium*) combined, and "*mund*" and "*frith*" appear to have the same signification; and, on the other hand, the institutions of the militia are utilized for carrying out the measures dictated by the peace-jurisdiction. A general proclamation of peace was usually issued by the kings on their accession. In the course of generations people became accustomed to refer back the rules of the civil law in these proclamations of peace, so oft repeated, so frequently confirmed in the National Assemblies, and so continuously employed by the courts of law—so that the old "folkspeace" passes into a "king's-peace," which includes the sanction to punish all the heavier crimes and offences.

every man shall find security, and the surety shall lead him and hold him to all right, and if any such do wrong and break out, then shall the surety bear what he should bear. But if it be a thief, and the surety can lay hold on him within twelve months, he shall deliver him over to justice, and shall receive back what he has paid."

For such as are not established in the household or on the land of a Thane, the tithings of the military organization are now made use of, and the man without a surety has to join these in such a way that either a special surety or the "*præpositus*" is answerable for him. This is insisted upon in Cn. ii. 20 as an universal institution of the country:—"And we will that every freeman be brought into a Hundred and a tithing, whoever will be entitled to purgation by oath, and to where, if any one kills him after he is more than twelve winters old, or be he no longer worthy of the rights of a freeman, be he one of the household or servant. And let every one be brought into a Hundred and under security, and let the surety constringe and lead him to all his rights."

The system of police security appears thus to have been definitely worked out. Every Thane is responsible for his household, and his village *Gerêfa* for the peasantry who were settled on his lands. The other independent freemen had to endeavour to gain so much confidence among the free peasantry that these latter through their headborough would undertake the security for them. The money-responsibility fell finally upon the community as a common duty, which in Norman times was inaccurately (from an external point of view) described as a "mutual security." Of course this system made it difficult for any landless man to change his habitation. A right of free migration was certainly recognized as an established principle; and all *Hláfords* are ordered by law not to prevent any "*liber homo*" from looking for another lord or *Hláford-sôcn* (Athlst. iii. 4, iv. 5, v. 1). But the departing freeman had first to prove that he had completely fulfilled all his duties to his former lord, and that he had obtained permission of the latter to leave his service; otherwise the new master cannot receive him (Edw. ii. 7; Athlst. ii. 22, iii. 4, v. i.; Edm. iii. 3; Cn. ii. 28). In connection with this system of a local police was a further responsibility of the Hundred for the due pursuit of thieves and for the production of their members before the court. According to an isolated document, it was attempted to create, as on the continent, a presentment making it the duty of the Hundred to give information on oath (Atheir. iii. c. 3., sec. 3); but the exact form of this cannot be gathered from the Anglo-Saxon laws. The insular position of the country,

and the pre-eminently peaceable character of the later Anglo-Saxon times, developed the maintenance of the peace to such a perfection, that the chroniclers give an almost Arcadian picture of the peacefulness and security of the land in the time of Ælfred the Great and at some subsequent periods. (8\*)

IV. *The Revenut of the Anglo-Saxon Kings* has, primarily, the same foundation as that of every great landowner, in the private property of the king; which is acquired, possessed, enjoyed, and is subject to alienations and testamentary dispositions, in the same manner as other Bocland. Besides the king, the queen also (and here is a difference from the usual matrimonial property law) can possess, manage, and dispose of estates in land in her own name. The king's rights of usufruct in the folkland, and in all the land that had not been assigned to individuals, on the occupation after the conquest (either because it was, from the nature of it, not suitable for grants, or that it chanced not to have been distributed), were originally much more im-

(3\*) The system of "mutual sureties" has formerly, in a very exaggerated manner, been made the basis of the whole Anglo-Saxon constitution by arbitrarily referring maxims of the Norman period to former centuries. This is the case with Maurer's treatise on the "Freipflege" (1848). As against this it is necessary to review all the information we possess as to the Anglo-Saxon surety, as, for instance, that given by Schmid in his "Glossarium" (pp. 644-649). Of very decided merit in clearing up doubts is Marquardsen's work, "Ueber Haft und Bürgschaft bei den Angel-Sachsen" (1851), with the results of which Konrad Maurer ("Krit. Zeitschrift," vol. i. pp. 87-96) agrees, after careful investigation. A still fuller review of the numerous opinions on the subject is given by Waitz ("Verfassungsgeschichte," i. pp. 424-473). The meaning of all this legislation is that, as on the continent (in the "Edictum Pistense" and the "Capitula Langobardorum"), those without any property—"sine proprietatibus in regno nostro degentes, atque non habentes res aut substantiam, quibus constringi possint"—should be brought before the court by some resident, and vouched for—"ut eos presentent aut pro eorum malefactorum rationem reddant" (cf. Waitz, "Die Verfassung," iv. p. 363). Where a village has undertaken to find bail, the opponent only comes upon the *præpositus*, who, in

case he cannot bring the bailee before the court, has to pay the fine himself, which he if possible recovered from the guilty party or eventually from his peasantry. This proceeding, so far as its consequences are concerned, led to the tithing being made answerable, which in Norman times was described incorrectly as "mutual security." This state of things I also find indicated in the *Leges Edw. Conf.*, cap. 20, sec. 4 (Harley's text): "*Quod si facere non poterit*" (if the *præpositus* cannot clear himself) "*restauraret dampnum, quod ipse fecerat, de proprio fortis-factoris quantum duraverit, et de suo; et erga justitiam emendaret, secundum quod legaliter judicatum fuerit eis;*" and, according to Hoveden's text, cap. 19, sec. 4, "*Quod si facere non possit, ipse cum Frithborgo suo dampnum restauraret de proprio malefactoris quantum duraret. Quo deficiente, de suo et Frithborgi sui perficeret et erga justitiam emendaret.*" With reference to the further responsibility of the inquisitorial duty of the Hundred, the Anglo-Saxon laws mention the pursuit of thieves and the production of members of the community before the court (*Edg. i. 5; On. ii. 20; Hen. 8, sec. 2; Will. i. 22, iii. 3, etc.*). The Hundred is responsible in *subsidium* for the villa for the non-discovered *murdrum* (*Edw. Conf. c. 15, 16*). The principal passage relative to the presentment is that in *Athlrd. iii., c. 3, sec. 3*, certainly only an isolated one.

portant. These estates, which remained at the disposition of the community at large, fell to the disposition of the highest Hláford; but with the reservation that the National Assembly retained its right to give or refuse its consent, whenever Folkland was to be converted into Bocland, i.e. to be irrevocably granted away. Large portions of the folkland were, indeed, in most parts of the country made over to the Ealdormen, Shir-geréfas, and other royal officials in lieu of a salary, and certain portions formed, until the close of the Anglo-Saxon period, the customary endowment of various offices. Great portions of the folkland, again, were lost by gifts to churches, monasteries, and foundations. A large part of what remained was utilized in maintaining the armed retinues of courtiers, and the personal servants of the king, in rewarding services rendered, and in bestowing marks of favour. Although they were legally revocable, yet such grants were for the most part permanent; with the exception of rents and services occasionally reserved, the immediate enjoyment was thus lost to the king. In the course of time, the universal eagerness for the acquisition of land, the power of the great nobles, and the influence of the favourites, led more and more to that allodification, which is chronicled in many existing records. From this time, accordingly, only single and separated rights of usufruct flow to the king from these sources. Especially springing from the original position of the conquered land, and from the right of disposition over unappropriated property, there arose a royal right extending over harbours, landing-places, and military roads, which became the source of customs and dues; also a right to salt-works and lead-mines, to flotsam and jetsam, and treasure-trove. A royal right with ill-defined limits attaching to forests is also probably deducible from the same principle. In Cnut's time, police regulations concerning forest and the chase appear, in which were included important rights of usufruct.(4)

(4) The financial rights are dealt with at length by Kemble, ii. pp. 42-87. The king's rights of usufruct in the *ager publicus*, or folkland, were important up to the later Anglo-Saxon times. From the original circumstances connected with the conquest, arose further a royal right over the high roads, harbours, and landing-places, which was the medium for especial peace proclamations, and for the tolls payable by ships and foreign merchants. Property thrown up by the sea was regarded as abandoned, and was the subject of a re-grant ("Cod.

Dipl.," No. 809), or formed an immediate source of revenue under the name of *nauffragium* (Leg. Hen. i. 10, sec. 10). The right of forest was originally an outcome of conquest, through which the existing woods became folkland, or common; that is, the subject of common enjoyment. In course of time, with the assistance of the police control, a sort of forest royalty arose, the ancient form of which was doubtful, but which in the comprehensive *Constitutiones de foresta* of Cnut is indicated by an extensive system of forest and hunting laws, re-

The profits derived from the control of matters of war, justice, and police became more important to the kings, as in course of time their private enjoyment of the folklund and unoccupied land ceased.

From the military power of the sovereign, first arose the right to the services of the people in the building and keeping in repair of the royal residences and castles, which services were rendered by the small freemen of the national militia, as a common burden. From the system of personal vassalage springs, again, the right of heriot, by virtue of which, on the death of the vassal, the armour or a pecuniary equivalent falls to the king. In the time of Cnut, when the position of the public officers as Thanes had become more developed, there appeared a general statute (Cnut. ii. sec. 72) which fixed the heriot of the earl at eight horses, four suits of armour, and two hundred *mancus* of gold; and so on in descending proportions was fixed the heriot of the greater and smaller Thanes. In Cn. ii. sec. 74, seq., a usufructory right of wardship and marriage was recognized, which was, however, certainly only intended to affect the widow and children of the vassal who had been directly equipped by the king. (4<sup>a</sup>)

From his judicial authority arises the right of the king to forfeited property. Boeland, as well as movables, according to the later laws of the kingdom, fall to the king in consequence of treason, theft, and other offences. Much more considerable are the numerous fines, which in the manorial courts are payable to the private magistrates, and in the royal courts are reduced by the fixed portions reserved to the Ealdorman and Shir-gerêfa. (4<sup>b</sup>)

serving important privileges to the sport-loving rulers of the land. The forest laws of Cnut already distinguished the "higher chase" as regal, from the lower chase. The existing text is, however, merely a later Latin translation and revision, which affords no reliable evidence of the age of many of the rules contained in it. All these sources of revenue may be described as "direct," in contrast to the following, which proceeded from the magisterial rights.

(4<sup>a</sup>) From the constitution of the army proceeded the right to acquire the assistance of the national militia, whenever a residence or a castle of the king was to be built or walled round. The performance of these duties, as a part of the *trinoda necessitas*, was, as a rule, reserved in all deeds of grant, even of the freest description. From the special right of vassalage proceeded,

again, the right to heriots. The heriots of Bishops, Ealdormen, and Thanes are frequently mentioned in the records of the tenth century ("Codex Dipl.," 492, 593, 699, 716, 957, 967, 979, 1173, 1223). It is doubtful, however, whether they were a general incident of the right of thaneship, or were only demanded of such followers as had actually received their equipment from the king. In the laws of Cnut (Cn. ii. sec. 72) the heriot appears as firmly fixed for the earl, for the higher Thane who "stood near the king," and for the lesser Thane. It is also mentioned in Domesday Book as a settled source of revenue. As to the profits arising from wardship and marriage, see Kemble, ii. 80.

(4<sup>b</sup>) From the judicial authority flows a considerable right to forfeited property. As early as the laws of Ine, the forfeiture of goods and chattels followed upon fighting within the king's palace

From the police control, besides the extensive system of fines, there proceeded a privilege of market, which was turned to profit by means of the reservation of certain payments. The police control led further to an increase in the system of tolls, which were levied in harbours and navigable rivers; and to the raising of protection moneys from merchants, Jews, and other foreigners who needed protection. (4°)

On the other hand the right of direct taxation was in the beginning unknown to the Anglo-Saxons. The Germanic chieftain might exact tribute from vanquished peoples, but "from his own people he only received presents, especially cattle and fruits." Such honorary gifts were presented on the occasion of the meeting of the popular assemblies. Likewise, when the king journeyed in the district over which his military and legal jurisdiction extended, he and his suite were entertained free of expense; and this custom became extended to the journeys of the royal governors and messengers and their trains. It is equally erroneous to regard as taxes the duties and payments, *Cyninges Gafel*, which accrued to the king from his demesnes, from the folkland, or from conceded rights, or as protection-money paid to the proprietor of the soil, although they were so regarded by Kemble and others. The Germanic community, great and small, state as well as parish, was based upon a personal relationship in the military and legal functions, and retained this character with more tenacity than we find in the structure of the Roman or Celtic states. Only in a condition of the deepest degradation, under Æthelred the Unready, could the National Assem-

(Ine, sec. 6), treason (Alfr. sec. 4; Athlst. ii. 4; Athlr. v. 30, vi. 37; Cn. ii. 57); and harbouring and succouring thieves (Athlst. i. sec. 3, and other laws). The Anglo-Saxon records give many instances of forfeiture both of Boeland and of movables for robbery and other offences. Much more important were the profits arising from the numerous fines (Edg. ii. 3; Athlr. vii. 8; Cn. i. 8). In later times the whole of the royal fines were granted to the landowners. The laws of Cnut already show a reversion of the old rule, and enumerate six offences as a royal monopoly, the fines accruing from which are still reserved to the king (Cn. ii. 12-15). In Wessex and Mercia the same principles are applied; according to the Dane law, these privileges were somewhat circumscribed.

(4°) From the police control was developed a market right. The closely connected right to raise tolls in har-

bours, and from the transport on the main roads and navigable streams brought the king indirectly considerable revenue. Without doubt the king decided which landing-places should be opened to all, *gefrithed*; whence arose the privilege of a free harbour. The right to raise tolls was more frequently the subject of grants to private persons, and yet more frequently of documents of enfranchisement, according to which an equivalent or a permanent revenue might accrue to the king. From the maintenance of the peace arose undoubtedly the right to protection accorded to foreign merchants, and later extended to the Jews (Leges. Edw. Conf., sec. 25) as the source of the protection tax. This right to protection, with a claim to Weregeld, is accorded only to actual foreigners (Edw. and G. 12, Athlr. viii. 33; Cn. ii. 40; Hen. 10., sec. 3, 75, sec. 7).



bly be induced to levy a tribute upon the country, to buy off the horde of Danish pirates. This tax, which was apportioned to the several hides, was then repeatedly paid as tribute to the invader, and from time to time also to the king, under the colour of protection-money, to enable him to guard against fresh invasions. The tax became finally fixed as *danegeld* at twelvepence for each hida. It was, however, merely a sign of the decline in the last century of the Anglo-Saxon state. Its origin, its name, the irregular manner of levy, and the exemption of the clergy from it, all make this *danegeld* appear as an anomaly. (4<sup>6</sup>)

Of course there was no such thing known in the Anglo-Saxon times as an exchequer administration. The free right of disposal of the king over all the State revenues is shown by an account given by Asser, according to which Ælfred devoted one half of his revenues to the Church and the other half to civil purposes. Out of the civil half he allowed one third for his warriors and followers, one third for hospitality, and one third for the innumerable artists and builders whom he had collected around him from foreign parts.

V. The Protectorate of the Church forms the last important right of the crown. It originated in the fact that the reception of the new faith and of the priesthood throughout the whole country was decided by edicts of the kings and the National Assembly. Hence, even in later times, the controversies among the clergy touching the time of celebration of Easter and other ecclesiastical differences were settled by the king. Among the original insignificant kingdoms in the British Isle it could not easily be forgotten that the Church owed its toleration, its reception, and its dominion to the

(4<sup>6</sup>) It is well known that a right of taxation did not exist in the Germanic kingdom. Tacitus speaks of gifts of cattle and fruits of the earth. Lodging and entertainment on progresses through the realm were extended from the person of the sovereign to those of his retinue, and, after the fashion of all honorary gifts, from being a mere matter of courtesy became a kind of right. And this soon led to the right of lodging and entertainment being extended to the royal messengers and servants, and came to include the providing of horses, the transport of baggage, and the maintaining of the train of followers. Many possessions and profitable rights belonging to the king were granted to monasteries and landed proprietors with the express reservation of such honorary gifts. In process

of time the confusion of mere custom with these reserved rights caused many a mischievous extension of them. Against these abuses, which are so frequently referred to in later times, the well-meant provision of Cnut was directed (Cn. ii. 69, sec. 1). With reference to the historical circumstances of the first *Danegeld*, see Lappenberg, i. 423. These shameful tributes had risen in 1018, to 82,500lbs. of silver. The apportionment according to hides was also acted upon in making naval preparations. In the year 1008, by an express resolution of the Government, a ship of war was furnished by every 310 hides. With regard to the immunity of the clergy, see Leg. Edw. Conf. cap. 11. Under Eadward the Anglo-Saxon Chronicle mentions the *Danegeld* as abolished.

authority of the king; and that the rich endowment of bishoprics and monasteries was due in great measure to his liberality in granting Bocland and in gifts of private property. The papal throne was too far distant to be able to raise pretensions to rule in a community which was neither wont nor inclined to dissociate authority from the personal presence of the ruler. The native prelates, again, in these small Anglo-Saxon states, stood so near the indigenous population, that it was difficult for them to raise exaggerated hierarchical pretensions. On the other hand the Church was obliged, as throughout the world in the Middle Ages, to endeavour to attain an independent position for its servants, if its official organization was not to be confused with the military, legal, and police constitution of the laity. The royal protectorate, therefore, applies rather to the outward framework of the Church, and does not interfere with its inner life and administration of details. The Anglo-Saxon king exercised the right of appointing the Bishops; in the face of which, the right of election which the Church aspired to in its canon law, could not practically assert itself any more than the occasional attempts at nomination by the papal throne. And again, in the monasteries, the manner of their foundation frequently led to a royal right of appointing the abbots. Just as indisputable is the right which resides in the king of sanctioning the resolutions of the Ecclesiastical Councils. A further union between the ecclesiastical and temporal community arose from the association of the prelates with the Thanes in the Witenagemôte, and from the appearance of the Bishop and the Ealdormen together in the County Assembly. In an insular seclusion the idea of the close bond of communion between Church and State is fostered and kept alive. (5)

(5) The protectorate by the king of the Church comprises in the first place the royal right of appointing prelates. This has been recognized in a fairly impartial manner by Lingard, "History of the Anglo-Saxon Church," i. 89. The great majority of precedents proves that the bishops especially were appointed and displaced at the free will and option of the king. It is also a significant fact that so many royal chaplains were raised to episcopal seats (Palgrave, i. 173, 174). According to Stubbs' view, the choice by the clergy was the rule in peaceful times, and for the less important seats. On the other hand, appointment by the king in the National Assembly is frequent in the case of archbishoprics and the larger

dioceses, when the consent of the National Assembly to the admission of a new member was regarded as a matter of course, as was proved by their consecration by their fellow-bishops.

The right of the king to give his consent to the resolutions of the clergy originally dates from the fact of the reception of the new faith at court, with the consent of the National Assembly. In olden times the king even appears in the capacity of president, at assemblies which bear the character of proper ecclesiastical councils (Cod. Dipl. No. 116, Willibald vita Bonifacii, ii. p. 838). When Church and State became somewhat more separated, the principle was certainly adhered to, that any change in the external institutions of

The sum total of these honours, powers, and profits formed itself under the Anglo-Saxon sovereigns into an hereditary family right. It is certain that the royal landed property contributed at first to this conception; yet this element of hereditary descent does not by any means preponderate in the Anglo-Saxon kingship. But more decisive was probably the feeling that a permanent personal authority was necessary for the present form of the community, as a counterpoise to the class-privileges which were growing up. The first object to be attained was the abolition of the struggle of the powerful families and their dependants for the possession of the supreme power. This end was attained so soon as the right of one of the princely families that sprang from Wodan was established beyond all question. The unity of the succession, and a certain precedence accorded the firstborn, was a natural though not an absolutely necessary deduction. The rule that in the case of private property the last will of the owner is final, was observed also in the case of the succession to the throne. As in the old folk-law, martial prowess was regarded as the necessary condition of complete fitness in the community, so it remained in the highest degree the necessary condition of the Anglo-Saxon kingly dignity. The times of the "boy kings" could not come until the West-Saxon dynasty had been consolidated by the unbroken succession of three glorious rulers. But just as the old Germanic village community tested the prowess of the youth in times of yore, so now the voice of the people could not be excluded in considering the question, whether the monarch to be appointed was worthy to lead the martial array of the nation. The Church also, from the time when it decided the preliminary question, whether a Christian marriage in accordance with God's laws had been concluded, and whether a legitimate heir had sprung from the union, laid claim to a share in recognizing the new ruler from this point of view. Accordingly it resulted that in the succession to the throne, the younger son was not

the Church, such as the regulations for the observance of the Sabbath, fasts, feasts, and Church dues, should be sanctioned by the king and Witenagemote. The great question of monasticism in the tenth century was repeatedly deliberated upon in the Witan (Kemble, ii. 189). The enactments of the General Council in the Anglo-Saxon legislation often form two categories: first, Ecclesiastical, and secondly, Temporal. (*Leyes Æthelstan, Eadmund, Cnut, etc.*) Both categories were, however, published as "King's Laws," and their contents show it to

have been generally received that new obligations could only be imposed upon laymen by the king in the National Assembly. The might of the sovereign is seen again in ecclesiastical disputes. In the first two epochs of a struggle between the king and the ecclesiastical hierarchy, at the time of Bishop Wilfrid and Archbishop Dunstan, the king triumphantly asserts a control over the resolutions of the Church, and over the right of appointing and dismissing prelates, against Rome as well as against the ecclesiastical councils at home.

unfrequently preferred to the elder, and the martial brother of the monarch to the immature and physically or mentally weak son.

A further result was the retention of a form of election at the enthronement of the new king, when not only the upper classes, but the whole nation, represented by the numerous *liberi homines* who were present, recognized by acclamation the new sovereign as their rightful ruler. But allowing for this, the character of an hereditary family right was decidedly maintained in the Anglo-Saxon time. "The royal authority was never allowed to be separated from the royal race." The elevation of Cnut to be king of the entire nation of Danes and Saxons, to the exclusion of the youthful sons of King Eadmund (1016), was an act of necessity and of military force, for which amends were made twenty-six years later by the unanimous proclamation of Eadward the Confessor, the last king of the race of Cerdic (1042-1066). But the Anglo-Saxon sovereignty still remained a "personal" dignity and authority over the Angles, Saxons, and Danes. The king's reign dates only from his coronation; his ordinary title is not that of king "of the land," but "of the people." The feudal notion of a lord of the soil over both land and people is the later creation of the Norman sovereignty. "Kings were the leaders of the people, not the lords of the soil" (Palgrave, i. 62).†

† The hereditary nature of the Anglo-Saxon sovereignty is treated from a one-sided point of view, if the feudal principle of primogeniture in landed property is taken as the starting-point, whence it would appear that out of nineteen successions to the throne in the united monarchy, not less than eight were irregular. Even at the zenith of the Anglo-Saxon dynasty Ælfred takes precedence of his elder brothers, and Æthelstan of his legitimate brothers. But in the latter case a legitimation by the reigning king, with the approval of the National Assembly and the clergy, had certainly preceded the accession. Every so-called irregularity in the West Saxon succession may be referred to testamentary disposition, to agreements respecting claims of inheritance, or to the personal incapacity of the person passed over. Ælfred the Great, in his will, expressly makes his title to the throne dependent upon (1) the will of his father, (2) an arrangement with his brother Æthelred, (3) the assent of the Witan of Wessex. Expressions in-

dicative of popular election are retained for centuries afterwards, such as in the phrase "chosen and raised" to be king, which recalls the very ancient popular custom of raising upon the shield. In coronation ceremonies there is always a tendency to retain old formulas, even when the original meaning has vanished. There is in them something analogous to the assent of the "by-standers" in the later popular courts. Palgrave (i. 562) describes them as a confirmation of the inchoate title of the sovereign. How firmly the hereditary right of the family stood, is proved beyond doubt by the period of the six so-called boy kings and by the solemn recall of Æthelred the Unready (who had been expelled by the Danes) even after the fullest proofs of his incapacity. Still more unjustifiable is it, when certain older instances of the dethronement of the king by the discontented nobles, as in the cases of Siegfert of Wessex and Beornred of Mercia, are cited as precedents for establishing a constitutional right residing in the Witenagemôte to depose the king.

(See Palgrave i. 653, 655.) The question whether an Anglo-Saxon king is to be regarded as "ruler of the people" or "lord of the soil" cannot be determined from single records, in which the clergy, writing in Latin, express themselves variously according to their individual tastes. Appellations, such as *totius Britannie Monarchus*, *Rex*, *Rector*, *Basileus*, occur already in the records of the tenth century. Ælfred the Great in his will calls himself merely "king of the West Saxons," his son Eadward on his coins "*Rex Anglorum*." Onut's style, who calls

himself "King of all England" (*Eallas Englalandes*), "King of the Danes and Northmen," with an intelligible allusion to the idea of a conquered country, is singular. Eadward the Confessor calls himself again "*Rex Anglorum*" or "lord of the Angli" (Saxon Chron. 1066). The early Norman kings call themselves on their coins "*Rex Anglorum*," in their charters sometimes "*Rex Anglie*." Upon the great seal the title "*Rex Anglie*" appears first under King John (Allen, *Prerogative*, p. 50, 5).

## CHAPTER III.

*The Union of the Kingdoms, and the Divisions  
of the Realm.*

THE social conditions out of which the Anglo-Saxon kingdom arose, led firstly to a plurality of small states. In the separate territories, in which the petty tribes and followers under their chiefs had settled, that system of property had also arisen which led to the rise of the royal dignity. The chiefs, although wielding power of various degrees, regarded themselves all alike as descendants of Wodan. A similar striving after independent authority animated them and their followers, their petty national and legal assemblies. Closely crowded together, they felt a keen longing after new acquisitions of territory, and yearned to satisfy their wonted lust for strife and booty, and thus soon became involved in countless quarrels and feuds, to which no natural limit set bounds. Mingled with these civil feuds were serious and endless struggles with their ancestral neighbouring foes in the west and north, the Britons and Scots. The constant state of readiness for war, which such a condition of things demanded, gave the skilled and better equipped retinues an increasing superiority over the humbler peasantry, who became more and more reluctant to forsake home and hearth, to engage in a profitless warfare with their kindred neighbours. In the course of the earlier generations of Saxon settlement, these petty wars had destroyed a number of small chiefs and kingdoms, of which history has not even preserved to us the names.

After the territorial boundaries had become more settled, there appeared at the commencement of the seventh century, seven or eight greater and smaller kingdoms : Kent, Sussex, Essex, Wessex, East Anglia, Mercia, Deira, Bernicia ; the two last became early united and formed the original Northumberland. Historians have described this condition of things as the "Heptarchy," disregarding the early disappearance of Sussex, and the existence of still smaller kingdoms. But this

grouping was neither based upon equality, nor destined to last for any length of time. It was the common interest of these smaller states to withstand the sudden and often dangerous invasions of their western and northern neighbours; and, accordingly, whichever king was capable of successfully combating the common foe, acquired for the time a certain superior rank, which some historians denote by the title of "Bretwalda." By this name can only be understood an actual and recognized temporary superiority; first ascribed to Ælla of Sussex, and later passing to Northumbria, until Wessex finally attains a real and lasting supremacy. It was geographical position which determined these relations of superiority. The small kingdoms in the west were shielded by the greater ones of Northumberland, Mercia, and Wessex, as though by crescent-shaped forelands—which in their struggles with the Welsh kingdoms, with Strathclyde and Cumbria, with Picts and Scots, were continually in a state of martial activity. And so the smaller western kingdoms followed the three warlike ones; and round these Anglo-Saxon history revolves for two whole centuries until in Wessex we find a combination of most of the conditions, which are necessary to the existence of a great State.\*

Fairly well and evenly populated, protected by no natural boundaries, and ever obliged to be in a constant state of

\* As to the principal features of the so-called Heptarchy, compare Lappenberg, i. p. 203 *et seq.*, 242 *seq.*, 277 *seq.* Kemble, "Anglo-Saxons," cap. 1. A detailed sketch of the particulars of the separate states is given by Palgrave ("Commonwealth," Cap. ii.), arranged in chronological tables; and by the tables of kings affixed to the first volume of Lappenberg's history. The smaller kingdoms which have been named, in addition to the Heptarchy, are the kingdom of the Jutes in the Isle of Wight, Suthrige, or Surrey, Hecana, or Hereford, Middle-anglia, Elmets, the land of the Hwiccas, the land of the Lindiswaren, and others. The "Bretwaldaship," at the time of the Heptarchy, has been the subject of various misconceptions, the more so as the word has been erroneously brought into connection with the Britons, whilst it etymologically expresses only the "powerful far-ruling one." Bede gives a detailed list of seven Bretwaldas: Ælla of Sussex, Ceawlin of Wessex, Æthelberht of Kent, Redwald of East Anglia, Eadwin, Oswald, and Oswi of Northumbria. The Anglo-Saxon Chronicle

says nothing further about the earlier times than that Ælla had first exercised an extensive sway. Later, the Anglo-Saxon Chronicle, A.D. 827, calls King Egberht "the eighth king who was Bretwalda." This Bretwaldaship has very correctly been referred to its real signification by Kemble ("Anglo-Saxons," ii. c. 1. pp. 7-19), as being an actual Hegemony (*cf.* also Freeman "Conquest," i. Appendix B). The union of the kingdoms under Egberht caused the introduction of the name "England" as the collective denomination. An old register of the Abbey of St. Leonard in York (cited in Dugdale's "Monasticon") contains the somewhat curious notice: "*memorandum quod anno domini 830 Egbertus rex totius Britannie in Parlamento apud Wintoniam mutavit nomen regni (de consensu populi sui), et fuit illud de cetero vocari Angliam.*" William of Malmesbury says that Egberht brought the kingdoms into a "*uniforme dominium*," and that he called this "Anglia." But Egberht only calls himself in one single charter of the year 828 "King of the English," elsewhere, generally, "King of Wessex."

military preparation against the Welsh, Wessex exhibits in its development some similarity to the great Marks of Germany. Military discipline, a legal succession, and a tolerably well-regulated internal administration, kept the Anglo-Saxon military organization here in better order than elsewhere, until, at the commencement of a new century, a king (Egberht, 800-836), who had been brought up at the court of Charlemagne, took the reins of government into his hand. Sagacious and energetic, he subjected the Mercian group of states, and won a recognized sovereignty over the whole country of the Angles and Saxons south of the Humber.

Under Egberht, the kingdom of the Anglo-Saxons first takes its position among the European states. With him begins a period of internal peace, beneficial for the consolidation of the constitution, and for the intellectual development of the people. Soon, however, recurs a period of unfortunate struggles with Danish and Norwegian pirates, whose mode of warfare brings the military array of the United Kingdom into disorder. But the common misfortune which befell the country at the same time strengthened the feeling of unity in the West Saxon portion of the land. Under Alfred the Great, the Saxon people rise to throw off the yoke of the invaders, and to regulate by treaty their relations with the Norsemen. A generation later the brilliant government of Æthelstan brings the Danish portions of the country into complete subjection. The realm and dynasty have now attained the pinnacle of that peculiar development which later times have associated with the name of Ælfred. He, the deliverer of his fatherland from the Danish yoke, the monarch in whose person the noblest moral and intellectual qualities of his race were combined with martial prowess, appeared in later generations to a grateful people as the author of all that was honourable and good, extending from ancient to later times. Three successive governments, those of Ælfred, Eadward, and Æthelstan, supplemented somewhat later by the fortunate government of Eadgar, have irrevocably founded monarchy as the personification of the political unity of the British Isle; after that, indeed, follows a second period of struggles with the Danes, in which the ancient royal race shows itself at times almost as degenerate as the Merovingians and the Carolingians of later times. After a generation of incredible weakness and humiliation, under Æthelred II. the nation exchanges its old royal race for the energetic rule of Cnut, the Dane, whose line quickly dies out, and is followed by Eadward the Confessor, the last legitimate heir of the West Saxon royal house.

The century from the accession of Ælfred the Great to the



death of Eadgar (871-975) is accordingly the era of consolidation, in which the country and people form a group, the framework of which has endured with marvellous stability until the present day. The formation of the English counties, and in great measure of their subdivisions also, dates from this century, in which the Anglo-Saxon laws have expressly called the county and hundred districts divisions of the realm, of which the tithings, although erroneously, are considered the lowest member.

I. *The formation of the English Counties or Shires* was the product of the later unity of the kingdom. Ecgberht's kingdom had certainly not yet attained to any unity in the political administration, but only to a recognized suzerainty, under which the former kings continue as mediatized under-kings. But after the dying out or removal of these mediatized chieftains, near kinsmen of the ruling house (*Æthelingi*), or other nearly related or connected great *Thanes*, succeeded to the place of these under-kings, until the advancing unity of the realm gradually brought all these rulers down to the position of mere government officials. Besides this, in the greater kingdoms, which had early attained a stricter unity, a division was made into districts, which were newly formed by the executive. The periodical assembling of the *Witan* for holding the great central court of justice, appeared impracticable in districts that had become of too great an area. Similarly, the organization of the militia required to be arranged according to divisions of the land, of not too wide an extent. This want was satisfied by the formation of administrative divisions under the name of "*Scire*" (derived from *Scyran*, to divide), which, at the time of their origin, were just as much an arbitrary formation as are our new "divisions" of counties. The abstract name "*Scire*" (not *gau*, *gà*, which does not occur in the Anglo-Saxon laws) is accordingly used also for the greater districts of the ecclesiastical administration, the bishops' dioceses, etc. In Wessex, where at a comparatively early date an organized administration existed, we find mentioned among *Ina's* laws a prefect of the shire (*Ine*, 36, sec. 8), and the change of residence from one *Scire* to another (*Ina*, 39). Similarly in the great Mark known as *Mercia*, an administrative subdivision must soon have become necessary. Incidentally, too, even before the time of *Ælfred*, certain names denoting "*scires*" are mentioned, as such "*Hamtūnscir*" (in 755), "*Defenascir*" (in 851). When after the deluge of Danish invasion, and the unutterable confusion under *Ælfred* (after 880), the kingdom came to be divided with the Northmen, a thorough territorial division appears to have been made for

the purposes of the army, of law, and for the system of the maintenance of the peace; which we might have conjectured from internal reasons would have been the case, even if it were not substantiated by proofs. Although under Æthelstan, Eadgar, and Cnut, principally in consequence of the union and subsequent separation of the territory surrendered to the Danes, many modifications may have been introduced, the century of the zenith of the Anglo-Saxon monarchy is the period in which was laid the foundation of the division into counties. Owing to the preponderance of the northern invaders, who returned after Æthelred's time, a permanent portion of the Danish element was retained, so that from thenceforth the counties were formed into the three great groups of the Saxon Law, the Dane Law, and the Law of Mercia. At the close of the Anglo-Saxon period, Simon of Durham, and Aldhelm, Abbot of Malmesbury, give the following list of thirty-two counties, which forms a safe basis upon which to proceed.

*"Anglia habet triginta duo Sciras extra Cumberland et Cornwallas. (In Cornwallas sunt septem parvæ Sciræ.) Sunt hæc triginta duo Sciræ divisæ per tres leges: West Sexenalaga, Denelaga, Marchenelaga.*

1. *West Sexenalaga habet novem Sciras: Suthsexia, Suthwai, Kent, Berocscira, Wiltescira, Suthamtescira, Somersetescira, Dorsetescira, Devenascira.*

2. *Denelaga habet quindecim Sciras: Eborascira, Snotinghamscira, Dærbiscira, Leorcestrescira, Lincolnescira, Norhamtunscira, Huntedunescira, Grantebrigescira, Northfolc, Sudfolc, Eastsaxe, Bedefordscira, Hertfordscira, Middlesexa, Bukingehamscira.*

3. *Merchenelaga habet octo Sciras: Herefordscira, Gloucesterscira, Wircestrescira, Scroboscira, Cestrescira, Steadfordscira, Warewicscira, Oxenefordscira."*

According to the position of the territorial divisions these thirty-two permanent counties form the following three groups:—

a. The historical distribution into counties prevails on the southern and eastern borders of the kingdom, which, at first conquered from the sea, became thickly populated by Angles and Saxons and early attained to a political organization. Here were formed from the two kingdoms of Kent and Sussex, the later counties of the same name. The kingdom of the East Saxons formed the counties of Essex and Middlesex. East Anglia is split up into the territory of the North-folk and the South-folk, and in later times into the counties of Norfolk and Suffolk. In Wessex the settlements of the Wilsætan, Dormsætan, and Samorsaetan form the later counties

of Wilts, Dorset, and Somerset, which retained the ancient names of old independent kingdoms.

b. The second great territory is formed of Mercia, the old great Mark against the Britons, and of the interior of the country. Here the administrative formation of the shires is shown by the fact that all counties were called after the name of some place which had acquired a certain importance, and was suitable for the meeting place and the centre of the administration. All names of counties here have an Anglian, Saxon, or northern nomenclature, denoting a place; such as -ham, -ford, -ton, -byrig, -wick, -by, -cestre (*castrum*); Hertford-shire, Buckingham-shire, Northampton-shire, etc.

c. The great Northumbrian kingdom, the northern portion of the land, after stormy and varying fortunes, became in some parts colonized at a later period, and unequally formed. The more northern part (Bernicia and others) belonged later to Scotland; in the southern portion Lincoln, York, and Durham formed counties called after a principal town; Rutland and Cumberland are, on the other hand, clanish names; Northumberland and Westmoreland were named from geographical peculiarities, and were not received into the rank of the counties until a later period.

After these events great differences must for a long time have subsisted between a governorship, formed out of an old mediatized kingdom, and one that proceeded from the administrative division of a greater kingdom; differences which only in process of time were adjusted by legislation and continuous practice. The laws regulating the rights and duties of the royal Ealdorman and Shir-geréfa must be regarded also in the light of such adjustments. All adjustments must have the same tendency, to make these territorial divisions as divisions of the jurisdiction of the king, in war, law, and police, dependent on his will. Hence the traditional principle — "*Divisiones scirarum regis propriæ sunt.*" (Edw. cap. 13.) (1)

(1) The division into counties or shires has by later legal tradition been directly attributed to Ælfred, and the difference in origin between the historical and administrative shires been ignored. To what an extent the word "shire" or "division" is used to denote a public government district, is shown by the fact that the earliest mention of a shire in the Saxon Chronicle relates to a bishop's diocese, "*biscope-scira*" (Chr. Sax. 709). And in the laws of the Anglo-Saxon kings "shire" often means an ecclesiastical diocese. (Edm. ii. 4; Edg. iii. 5; Athl. v. 6; vi. 1,

sec 3, 21.) Gradually the "shire" becomes the exclusive appellation for the great county districts for the purposes of military and legal organization. Among the laws this meaning first occurs in Ina, 86, sec. 1, 39; Alf. 37 pr., sec. 1. That under Ælfred a thorough territorial division took place is credibly asserted by William of Malmesbury (De Gest. Angl. ii. 4), but he only speaks of a division "*in centurias quas hundred dicunt.*" Ingulf ("Historia Croyland," i. 41) says very positively; "*totius Angliæ pagos et provincias in comitatus primus omnium commutavit; comitatus*

II. The Hundreds appear in the statutes as the regular sub-districts of the county only after the tenth century, under Eadgar. They must, however, be anterior to this date, for the Hundred is the old Germanic division of the military system, which recurs among all Germanic races, as also among the Saxons on the continent. That the name soon became applied to a district, which after the settlement had to provide one hundred men for the militia, can be deduced from the variously interpreted passage of Tacitus (Germ. cap. 6), "*quod primo numerus fuit jam nomen et honor est*;" but it follows with greater certainty from the nature of the case and from later indisputable circumstances. Certain it is that, soon after the settlement, the militia was organized as far as possible in equal contingents, which became a territorial division, so soon as it became necessary to apportion the duty of furnishing the contingents according to extent of landed possessions. As, however, legal rule on this point was never established, as necessity and ability to supply it were continually producing changes, owing to the vicissitudes of the times, the diversity of tenures, and later to the frightful ravages of the Danes, the distribution of land remained even in still later times a matter of arrangement, and was left to the decision of the county under its royal governors and bailiffs.

The rule in this case which has been preserved to us was, "*Divisiones hundredorum et wapentagiorum comitibus et vicecomitibus cum judicio comitatus*" (Eadw. Conf. 19). And hence it is clear why the Hundred is recognized so comparatively late as a fixed territorial division, why the Saxon Chronicle does not mention the Hundreds, and why the Saxon

*in centurias, id est hundredas, et in decimas, i.e. tritingas divisi.*" By later critical investigations (Palgrave, *Quarterly Review*, 1829, vol. 67, pp. 289—298), it has now been established that this writer was not the old Anglo-Saxon abbot, but a pseudo-Ingulf of the end of the thirteenth or commencement of the fourteenth century, who, however, drew his information from the old chronicles. In point of fact his assertion agrees with all the rest. The Saxon chronicles before the time of Ælfred know only of the old divisions after clan names, and territories; Cant-waraland (Kent), Westsæxan, Suthsæxan, Eastsæxan, Middelsæxan, Eastengle, Northanhymbra-land, Suthanhymbra-land, Myrcnaland, etc.; but after Ælfred's days the customary terms became altered, and the various manuscripts use only the word Scir (Kemble,

i. 63). The most probable date of a thorough division into provinces is shortly after 880, i.e. after the peace between Ælfred and Guthrun. A proof of this is furnished by William of Malmesbury, and others in the list quoted in the text. Quite identical with it, only with different orthography, is the list given by Bromton (*X Script. ed. Twysden*, p. 956). The country between the Ribble and the Mersey, the Lancashire of modern times, does not appear in Anglo-Saxon times as a separate department. A few small shires, which had been for some time independent, were in later times incorporated with others, as Winchcombe-shire with Gloucester. As to the system of the division into counties compare Palgrave, l. 117, and the introduction to the Census of 1851.

documents concerning property so seldom describe the position of estates with reference to the Hundreds. As districts of the early militia organization, and consequently of the peace-control, the Hundreds were certainly in existence long before Ælfred's time. As to the universal appearance of the Hundreds in the Germanic militia system, the work of V. Peucker ("Das Kriegswesen der Germanen") gives a new and convincing proof. The silence of the Anglo-Saxon legal authorities of the early centuries cannot be entitled to any regard, on account of the extreme rarity of their allusions to the military system. But it may be taken as certain that at the reorganization of the State by Ælfred, a thorough revision, or redistribution, was made of the districts furnishing contingents. William of Malmesbury (ii. 4) expressly describes these new divisions made by Ælfred, as "*Centurias, quas hundred dicunt.*" In the language of Wales and Hibernia, the word "*cantred*" is used instead of Hundred, and in the north we find the term "*Wapentake*," derived from a military usage in mustering the troops. When the monarchy was at its prime, the Hundred in the Anglo-Saxon statutes denotes a sub-district of the shire, geographically limited, with its separate assemblies for the purposes of army, justice, and maintenance of peace. In these later times the Hundred Court is the ordinary court for freemen, and holds its sittings every month. The division into Hundreds in the form which it assumed at that time remained in existence almost to our own day. As in the division into counties, here also an historical and an administrative principle worked in different directions, and created great inequalities. In the southern portions of the country, which early became thickly populated, the number of Hundreds was very large:—in Kent, sixty-two; in Sussex, sixty-four. The midland counties are to a certain extent different, Dorset having forty-three, Suffolk twenty-one, and Essex twenty Hundreds. In the north, where the population was thinner, the cultivation more defective, the land poorer, and the organization developed at a later period, the numbers are remarkably small: in Warwick, four Hundreds; in Cumberland and Westmoreland, four Wards; in Stafford, Worcester, Rutland, five Hundreds; in Leicester, Nottingham, Derby, Lancaster, six; in Durham and Northumberland, six Wards; in Cornwall, nine Hundreds. In large provinces sometimes an intermediate division between County and Hundred arose, as the "*Trithings*" (or third portions) of Yorkshire. (2)

(2) The division into Hundreds is often referred to in old records as a union of a hundred *hidas*, or families;

from erroneous confusion with these, a hundred *vills* are sometimes made out of them, as in Bromton (ed. Twysd. p.

III. A division into Tithings, Tiothings, Decanix, has been erroneously held to be a general territorial division of the Anglo-Saxon period. This mistake was caused by the account given by the pseudo-Ingulf, who informs us that Ælfred divided the counties "*in centurias, id est hundredas et in decimas, id est trithingas*;" in this a mistake is already apparent in the word "trithing." The division into tithings for the purposes of the old military array, in which the numbers ten and one hundred can be proved to have been nearly everywhere the units of the organization, was indeed very ancient. The national militia had likewise always had its "tithings," but these did not lead to a division of territory, for the apportionment of the contingents remained a shifting matter of administration for the smallest divisions, much more than for the greater ones. What the Anglo-Saxon statutes really contain touching the Tithings (*decanix*, or theotings) is limited to the following:—According to Athelst. vi. 4, the members of the Tithing should, on summons, join

956), and Ranulphus Cesta (l. 50). Spelman (p. 365) says on this point, "*Nusquam (quod scio) reperiuntur 100 villæ in aliquo Hundredo per totam Angliam. Nescio an medietas. Magni habentur qui vel 40 vel 30 numerant. Multi ne 10: quidam duas tantum et nonnulli (ut Hundredi de Chelham, Warden, etc. in Comitatu Cantii) unius sunt contenti.*" The correct view probably is, that the occupier of a peasant's hide, *familla*, should furnish one man to the original settlement of small peasantries; so that frequently at the time of the first colonization a Hundred contained a hundred hides under the plough. But as the districts for contingents were more permanent than the state of cultivation, the Hundreds, in their later state, contained much more than a hundred hides under the plough; sometimes less, where there had been a falling off in prosperity. The great Hundreds in the north, which had been formed later, are, taking the one hundred hide standard, disproportionately large (in Lancashire, on the average three hundred English square miles), whilst many a small Hundred contains scarcely more than a quarter of a mile. Hence it is that later historians expressly assert the indefiniteness of the hide-measurement (cf. Gervas, Tilb. i. cap. pen., "*Dialog. de Scaccario*," "*hundredus ex hydarum aliquod contentis, sed non determinatis constat; quidam enim ex pluribus, quidam ex paucioribus constant.*") This

inequality led, in the later Middle Ages, to the division in some counties of Hundreds into half-Hundreds; whilst, on the other hand, two Hundreds, or one and a half, were sometimes united for the purposes of administration. The persistent retention of the division into Hundreds is explained by the fact that the Hundred Court was held every four weeks as a regular court (Edw. ii. 8; Edg. i. 1, iii. 5), and thus the conservative character of all judicial systems became communicated to the Hundred. That administrative convenience was largely considered in the earliest divisions, is proved by the fact that, whenever possible, the Hundred grouped itself round a given place, suitable for a centre. Of the 799 names of Hundreds, Wapentakes, or Liberties, which are in existence at the present day, no fewer than 362 are identical with a town lying within them ("Introduction to the Census of Great Britain," 1851; also as to the Hundreds generally, see Landau, "*Territorien*," 215, 216). In certain counties a middle division occurs. In Kent there are to be found several Hundreds united under the name of Lathe, which exercised the same judicial powers as the Hundreds. In Sussex is found a division into Rapes, without any jurisdiction, which remained with the Hundreds. York and Lincoln were divided into Thirthings (third parts), which still exist under the name of Ridings.

in pursuing criminals. According to Athlst. vi. 8, sec. 1, those who rule the Tithing (the heads) should meet the Hyndemen in London every month to maintain the peace. According to Edg. i. 1, 2, notice of a theft should be given to the Hundred men and Tithing men. According to Edg. i. 1, 4, no one was allowed to possess chattels (cattle) unless he had the certificate of a Hundred man, or a Tithing man. According to Cn. ii. 26, every free man shall be brought into a Hundred or Tithing, for the purpose of police sureties. It is evident that these quotations refer to police institutions and constabulary societies formed of the inhabitants, but not to local districts, or village marks. In numerous records of this period, the position of estates is determined by reference to the Hundred, but never to the Tithing-district. Among the innumerable details contained in Domesday Book, the words "*decania*, *decenna*, *teōthing*, *tything*," do not once occur. The local districts of the Anglo-Saxon administration were, for the most part, determined according to the tenures of the properties. The numerous settlements made by "*coloni*," upon loan-land, the submissions of the allodial peasants to a Hlāford, as well as the subsequent extension of the jurisdiction of manorial courts over the allodial peasants, rendered the type of dependent communities the prevailing one, and a territorial division according to free peasant villages impossible. Difficult as it is to obtain a reliable picture of the local organization of the kingdom, at this, its lowest stage, it is perfectly clear that the nature of the existing societies absolutely excluded a territorial division into "Tithings." (3) The existing local societies, on the other hand, are as follows :—

(3) The local divisions of the Anglo-Saxon territory can never be clearly understood from historical sources. The old error that the Anglo-Saxon "Theotithing" is a geographical local district, has, however, become established owing to a passage in the pseudo-Ingulf, who connects the matter with a register of landed property which Ælfred is said to have drawn up, "*talem rotulum ediderat, in quo totam terram Angliæ in comitatus, centurias, et decurias descripserat*;" whilst William of Malmesbury only says that it had been ordered, "*ut omnis Anglus haberet et centuriam et decimam*." Ingulf makes of this, "*ut omnis indigena in aliqua centuria et decima existeret*;" the former words express an association of persons, the latter contain a description of a local district. As the militia system of the fourteenth century had introduced local tithings under a petty constable, the

pseudo-Ingulf thought that this state of things was already existing in Anglo-Saxon times; and he brought the system of police sureties (in the confused way in which the author of the *Leges Edw. Conf.* 20, describes it) into connection with it, fantastically portraying the "*decenna*" under its tenth man, as a village court, exercising a formal jurisdiction, analogous to that of the Hundred under its Hundred-man, and the county under its Shire-gerefa; which gives the idea of a system of many thousands of judges chosen by the people! Instead of this chimerical network of smaller and smaller courts of law, we can only find in reliable authorities that picture of local administration which I have delineated; within which no free village courts and villages can possibly be formed of a mere militia system.

*Lordships* with their tenants and dependents. First in importance were the royal demesnes, on which a royal bailiff combined the management of the estate with the levy of the royal dues, with the legal jurisdiction over the tenants, and with other functions of militia and police. A similar position belonged to the *Gerêfa* of great private estates. These villeins and servants do not exactly live in regular villages, but are settled in the vicinity of the lord's seat (afterwards the "manor"), and increase in numbers as landless wanderers come and settle amongst them and put themselves under the police protection of the lord of the soil. Ten families form the smallest community recognized for police purposes, and for the appointment of a provost (*præpositus*). As such, under the later system of police sureties, they form their own police union as a manorial Tithing, as well as a court for the settlement of local disputes; by later grants of land this was extended even to the allodial peasantry settled among them, "*super omnes allodiariorum, quos eis habere datos*" (Codex Dipl. No. 902).

Incidentally, too, the *parishes* under the spiritual office of the parson were associated with these, though the former were formed independently, embracing both freeholders and villeins, servants and landless settlers, and were therefore bodies suitable for initiating the separate local government system in England in later centuries.

*Larger unions* of more independent folk, united for the administration of justice under a royal or manorial *Gerêfa*, and often freed from the duty of appearing as lawmen in the Hundred, were for the most part entirely or partially co-ordinated with the Hundred. This was an advantage for those who participated, and their legal duty was lightened in that, under the guidance of a magistrate, they formed a separate judicial district, with the powers of a Hundred. Of equally vital importance to the freeholders in their relation to the neighbouring Thanes, was the protection of a powerful magnate; to which were sometimes added certain advantages of wood and pasture. The question here is not one of submission of person and property, but of a magistracy (*soca*), under which the heritable property of the "*soemanni*," and their immediate obligation to serve in the military array, remained unchanged. Towards the close of the Anglo-Saxon period the grant of a whole Hundred sometimes occurs. For instance, under Eadward the Confessor, a certain Hundred in Berkshire was granted to the Abbot of Abingdon, and a Hundred in Surrey to the Abbot of Chertsey, with the command "that no royal *Shir-gerêfa* hold court there," or interfere in legal matters (Cod. Dipl., 840-849).



An analogous but more compact creation is found in the numerous royal or manorial *Burhs*, which constitute, under a separate *Gerêfa*, a special jurisdiction, in which a *Burh-gemôte*, held three times a year, is combined with the Hundred Court (Edg. iii. 5; Cn. ii. 18). The origin of the *Burh* is apparently due to the need of a military protection in the Danish times. A hill with a rampart of earth or a strong wall, was sufficient protection against the sudden attacks of robber bands. In the statutes "*Burh*" or "*Byrig*" signifies also a single fortified building (Edm. ii. 2; App. iv. 15; Athlr. iii. 6), as well as a town (Athlst. ii. 20, secs. 1-4; Edg. iv. 2, pr. 3, 4, 5; Athlr. ii. 5, sec. 2; ii. 6; Cn. 34). Discerning rulers like Ælfred made use of the remains of old "*civitates*" and "*castra*" and other advantageous positions for such fortifications, and the protection which these afforded was readily sought by the neighbouring freeholders, tenants, and vassals, and also by landless men and small tradespeople who were living amongst the servants and followers of the landlords. The differences in the legal position of the people thus crowded together rendered expedient the appointment of a special royal magistrate (*Gerêfa*), who was also endowed with extraordinary military, police, and financial functions. At the close of the Anglo-Saxon period the *Burgenses*, and in later times the constitution of the English municipal boroughs, arose from these beginnings.\*

Wedge'd in among these numerous degrees of property and power came the rest of the freemen, who on their heritable possessions preserved intact their independent position in the military, legal, and police institutions. In many parts of the country these peasant communities lay close enough together to enable a free *teotthing* to be formed out of ten or

\* The formation of the *Burhs* is, according to the convincing reasoning of Kemble, not in any way immediately connected with the British-Roman towns of the fifth century, which *Gildas*, in the sixth century, represents as being already forsaken and in decay. Still the existing ruins would in later times be utilized for the purposes of fortification. In certain places the name "*city*" was retained in memory of an old "*civitas*." The peculiar life of the *Burhs* is due to the fact that the free tenants, tenants on granted land, dependants, servants, and bondsmen of the king, as well as of private lords, lived densely crowded together, and that under the *Burh-gerêfa* the legal, police, and finance administrations were united in one person. That

the *Burgenses* as such were not released from military duty is shown by many accounts given by the *Domesday Book* (e.g. Bury St. Edmunds, 371). But many *Burhs* were favoured by being rated for the purpose of furnishing the contingent at a small landed property scale of 5 *hidæ*, 15 *hidæ*, or 20 *hidæ* (Chester at 50, Shrewsbury at 100 *hidæ*). Of course the royal dues were proportionately raised, and hence the *burhs* became more important for the finance control than for the defence of the country, as the fortresses had again been allowed to fall into ruins. Kemble (ii, pp. 470-478) has selected from the Anglo-Saxon Chronicle the names of eighty-eight places, all of which may in some measure be regarded as fortified.

more households. But often where the free peasants were scattered about at great distances, it was with difficulty that they were brought together into a "teething," while the greater part of them had already been incorporated into the system of lordships, magisterial, and bailiff jurisdictions.

In the inner administration of the country these various local groups clash with each other and are not kept distinct. Most of them have no exclusive local jurisdiction; the majority do not form exclusive local districts. A separate magistracy of the king or of a landowner does not exclude military duty in the Hundred. The tenants within the jurisdiction of private courts, in quarrels with outsiders, come under the jurisdiction of the Hundred Court. The police organization is arranged partly according to the military and partly according to the legal districts. Thus within the narrow limits of a castle, and in the vicinity of a lord's "*mansus*," freeborn men might be living close together under manifold legal conditions, having very different duties to fulfil towards the king or their own mesne lord.

Hence we are led finally to the negative conclusion that there existed no systematic formation of local districts, and, moreover, that the Tithing was no such local division.\*\*

\*\* All these local distinctions cross and overlap in the most varied fashion. But it remains firmly established that the personal liability to military service continues independently of the subjection to a magistrate's jurisdiction, and that the peasant farmers, who were actual tenants, in case of disputes with third persons, appeared before the royal Hundred Court. The legislation accordingly remains based upon the old constitution; that is, upon the free community. County and Hundred assemblies are now, as formerly, active in all matters affecting military, legal,

and peace control, even above the interests of property. This legal rule, however, does not exclude the fact that dependence on property is the most important element in regulating the conditions of life, and that the division into separate estates with their tenants represents the prevailing local division. "Instead of the earlier division into free landowners and landless freemen, a division of the people into landlords and tenants has been introduced" (K. Maurer, "*Münchener Krit. Ueberschau*," ii. 59, 60).

## CHAPTER IV.

**The Offices of Ealdorman and Shir-Gerêfa.**

A MUTUAL bond of union connects the districts with the arrangement of the offices of the Anglo-Saxon kingdom, namely, the two principal offices of Ealdorman and Shir-gerêfa. In them, as in the districts, an historical and an administrative principle clash together. The former is predominant in the origin of the Ealdorman, the latter in that of the Shir-gerêfa.

I. **The Ealdorman, Dux, Comes,** is the highest civil official of Anglo-Saxon times. When the union of the smaller kingdoms with the greater began, the sovereignty of the new common ruler was confined at first to privileges and profits, whilst the former petty state retained its own General Assembly, and, with a sub-king at its head, preserved its military and legal system. The oldest Ealdorman was actually a Viceroy, "*subregulus*," which title often occurs in the signatures to Anglo-Saxon documents. In his decrees he used the royal style: "*cum consilio episcoporum, optimatumque meorum*." The province of such Ealdormen embraced, in fact, a former independent state. He was not unfrequently the subjected king in person, or a member of his family, or else "*Æthelingi*," near kinsmen of the reigning Over-king, were appointed to such places of trust. The name "Ealdor," too, is a reminiscence of patriarchal chieftain-lineage of a former period. It does not signify a man old in years, but the "*superior*," "*senior*," in a higher, more exalted position. Even in the times of the Heptarchy the military, legal, and police organization draw closer together. The Ealdorman becomes more dependent upon the central administration. The new administrative division of the great kingdoms into shires causes the appointment of new governors, who are at first merely the highest district officials, and whose district assemblies do not involve any customary right of independence. The mention of Ealdormen with such official positions runs side by side with the gradual rise of the division of the

kingdom into shires. In the early organized kingdom of Wessex the Ealdorman is mentioned in Ine's laws, which the king promulgated with the advice "of all his Ealdormen" (Ine, pr.), and in which also the disobedient Ealdorman is already threatened with the loss of his shire (Ina, 86). The small kingdom of Kent appears at the commencement of the eighth century to have had as yet no Ealdormen, whilst on the other hand, in a National Assembly, held in 814, the names of three *Duces* of Kent and sixteen *Duces* of Mercia are found among the signatures. Hence it is clear that even before Ælfred's day necessity had led in the greater kingdoms to administrative governorships. The confusion caused in the original state of affairs by the invasion of the Danes and the reorganization of the whole land by Ælfred led to a greater uniformity in the administrative character of the Ealdormen. This assumption is confirmed by the *Egils-saga* of Iceland, c. 21 (K. Maurer, "Krit. Ueberschau," i. 86), which tells us, "Ælfred the mighty had taken away from all *Skatconunge*" (i.e. viceroys) "their name and their power. Jarls, those were called from henceforth who had been called kings, or kings' sons." In the flourishing period of the Anglo-Saxon monarchy the Ealdorman now appears as the governor appointed by the king in a threefold capacity.

(a) Together with his County Assembly he directs the equipment of the militia and the apportionment of the contingents, and brings them to the royal army. He may also, when commissioned by the king, take the command of the whole army, in which capacity he is mentioned on important occasions in the *Anglo-Saxon Chronicle*, which speaks of Ealdormen as commanders of single counties (in the years 837, 845, 851, 853, 905), or Ealdormen simply as commanders of a whole army (in 851, 871, 894, 992, 993, etc.). In the statutes this capacity is regarded as being a matter of course.

(b) He presides at his County Assembly, as at the ordinary National Court (Ine, 50; Alfr. 88; Edg. iii. 5). "Let there be held . . . twice a year, a Shir-gemôte, and let there be present at the Shir-gemôte, the Bishop and the Ealdorman, and both shall here administer spiritual and temporal rights;" which is almost word for word repeated in Cn. ii., sec. 16.

(c) As guardian of the peace within his district, he exercises the royal police jurisdiction. To him the peace proclamations of the king are, in the first instance, directed. The right of supplementing ordinances, which lies in the royal maintenance of the peace, gives him also a derivative licence to issue peace proclamations within his district. The breach of his peace is punishable by the infliction of a special peace fine (Athlr. iii., c. 1). Any man who intends to change his

master, must give notice to him (Alfr. 37). After a breach of the peace has taken place, his duty is to prevent feud, and to protect the weaker party (Alfr. xlii. sec. 8); to take surety from men accused as breakers of the peace (Edm. iii. 7, sec. 1); and to assist the inhabitants of royal burghs to the utmost, in securing breakers of the peace (Athlr. ii. 6).

The combined position which proceeded from these various functions was one of the highest dignity and the highest rank, which, according to the legal system of the times, found expression in a weregeld, as high as that of the bishop, and four times as high as that of the common Thane (App. vii. 2, sec. 8); in an increased punishment for breach of the Burg-peace (Ine, 6, 45; Alfr. 40); in an increased Burgbryce and Mundfyrd (Alfr. 3.; Cn. ii. 58; App. iv. 11); in an increased fighting Wite (Alfr. 15, 38; App. iv. 12); and in a special right of asylum (Athlst. iv. 6, sec. 3; v. 4, sec. 1; App. iv. 5). For official income he had the use of considerable portions of the folkland, and a third of the forfeits, fines, and other royal dues which fell to the king. The Ealdorman in this position is the most eminent official in the kingdom, and has the first place in the temporal council of the king; but only in his capacity of governor, whose right depends upon the king's commission, and whose office expires as soon as this is withdrawn. In the beginning the Ealdorman had certainly been a successor of the king of the country, and at his appointment the form of election by the popular assembly probably continued for a long time. But a free right of election could not possibly be recognized, if the incorporation of the media-tized kingdom was to last; indeed, the kingship asserted as a principle a right of deposition (Ine, cap. 36). It is told of Ælfred, that he emphatically reminded his state officers "that they had their office from God and from the king." (1)

(1) On the office of Ealdorman and Earl, Heywood "On Ranks," pp. 55-117, contains a lengthy exposition. The Latin terms, *Dux*, *princeps*, and *comes*, are very arbitrarily interchanged, as also are *consul*, *patricius*, *praefectus*, according to the fancy of the cleric who drew up the record. The introduction of analogies of the *comes*, *dux*, and *senior* of the Carolingian constitution is also confusing, for these dignities had different territorial, possessorial, and national foundations, and an early history of another type. It was quite natural that in the aristocratic development which the political organization took, the class of Ealdormen should be identical with a small number of the greater landowners. The office of

Ealdorman appears at an early period attached to the great families, but is not hereditary. Amongst Ealdormen whose names have been handed down to us, instances occur of father and son following immediately one another, but this is very seldom; on the other hand, the deposition of an Ealdorman is very rare; and intermarriages between the Ealdorman and the families of the Anglo-Saxon kings are very common. All these conditions are the expression of the power wielded by certain great families, and of a strongly marked class privilege, but not as yet of an hereditary nobility. Still less, under such a condition of things, could the office of Ealdorman be elective, of which even Kemble speaks erroneously

Certain changes were brought about during the last century by the influence of the Danish element. Among the northern pirates, we find, besides the kings, commanders-in-chief called Jarls. This northern term was related to the Anglo-Saxon Eorl, which from time immemorial signified a man of great rank, and was well adapted to be blended with the Eorl or Earl. For some time accounts of battles speak of Ealdormen on the Saxon, and Earls on the Danish side. As early as the statute of Eadward and Guthrum there occurs (in c. 12) the common name Earl (also in Edg. iv. 15). The influence of the Danish element naturally gained strength in the second period of the Danish rule after Æthelred (Athl. iii. 12). Under the reign of Cnut, history records only the appointment of new "Earls." Cnut's law touching the amount of the heriot (sec. 7), only speaks of "Eorl;" in the Shir-gemôte (Cn. ii. 18) we again find the term "Ealdorman." More important still was the breach which was at that time made in the ancient position of the noblest Anglo-Saxon families. Danish families, and sometimes also bold warrior upstarts, in a great measure supplanted the old race of the Ealdormen, and with the varying fortunes of battle the governorships also become thoroughly altered in character. In times anterior to these it had been often found advisable, for the protection of the country, to unite several shires under one Ealdorman. Under Æthelred this tendency to centralize the commander's office increases, evidently in order that the whole army of a district may be more speedily massed, and employed with greater effect, at the points threatened by the enemy.

With this idea Cnut formed four great provinces, at the head of each of which a great Eorl was placed, whose rank answered to a ducal rank, even according to the higher standard of the Continent. Under Eadward the Confessor,

(ii. 126). Among the statutes of Eadward the Confessor (cap. 32a, sec. 2, in Lambard's text), the following isolated and extraordinary notice appears *de heretochis*. "*Erant et alius potestates et dignitates constituta, qui Heretoches apud Anglos vocabantur, scilicet barones, nobiles, etc. Latine vero dicebantur ductores exercitus; apud Gallos, capitales constabularii, vel marchalli exercitus. Isti vero viri eligeantur per commune consilium—et per singulos comitatus in pleno folomote, sicut et vicecomites provinciarum et comitatuum eligi debent,*" etc. This pretended election, as well as the name "Heretoches," is quite foreign to Anglo-Saxon ideas. It must not be

forgotten that these statutes are a private work dating from the twelfth century, in which the learned author introduces, in a hundred places, his own knowledge of the continental popular rights, a knowledge accessible to the clergy. Seeing the heavy weight of Norman officialism, at the time that work was written, nothing would be more popular than the idea of a free general election of the highest officials in the county. Not merely the right of deposition, which was a recognized right (Ina, c. 36, Cod. Dipl., No. 1078), but all the monuments of Anglo-Saxon law and history, are opposed to the idea of elected Ealdormen.

this grouping of the counties is again altered, and for a short time we hear once more of Ealdormen and Eorls side by side. But as since Cnut's day the idea of a higher and greater governorship had been attached to the appellation of "Eorl," the title which was considered the higher, became, as is usually the case, the dominant one. The Anglo-Saxon Chronicle after 1048 speaks only of Eorls. In the language of later times, the old honourable title of "Alderman" was only retained for the authorities in inferior local administrations. (Leges Henr., vii. sec. 2; viii. sec. 1; xcii. sec. 1.) (1<sup>a</sup>)

II. The Office of Shir-gerêfa appears to have been a second official position under the Ealdorman, instituted for the administration of the whole county. In rank coming next after the Ealdorman (*Ealdormannes gîngwa*, Alf. xxxviii. sec. 2), the sheriff attained in process of time an increased importance, and at the close of the Anglo-Saxon period had become the most important official of the active administration. In marked difference to that of the Ealdorman, the office contained no remains of the old royal dignity, but had a purely administrative, even a pre-eminently economic character, which was caused by its financial connection with the great landed properties. Every Anglo-Saxon magnate had to collect rents, payments in kind, protection moneys, and dues; to superintend the service of his followers, to settle their disputes, and to satisfy the royal demands relative to the military array and the legal and police duties. The officer appointed with full power to fulfil these functions was called Gerêfa, a name which includes also the ordinary estate-bailiff. In a higher degree, however, the king needed in the different districts of his kingdom a head-gerêfa for the exercise of his rights of usufruct and to undertake the varying duties of the royal administration. This gerêfaship so thoroughly pervaded the whole life of the Anglo-Saxon times that in the Norman period the collections of private law found occasion to remind their contemporaries of its original signification. Thus, in the laws of Eadward the Confessor we read (cap. 82), "*Greve autem nomen est potestatis; apud nos autem nihil melius videtur*

(1<sup>a</sup>) The alteration of title is the first change referable to the Danish times. The substantial change made by Cnut is of more importance, when he divided the country into four considerable provinces, in 1017. Wessex is reserved by Cnut for himself; East Anglia is entrusted to Thurkill; Mercia to Eadric Streona (who, as an Anglo-Saxon, still bears the title of Ealdorman); Northumbria to Eric, as an upper governorship. This altera-

tion must have only materially affected the constitution of the army. The holding of the county court in such an extensive district was practically impossible. The old smaller county districts remained in existence, as court assemblies, in which now the Shir-gerêfa regularly presided. Hence, with this change, a separation of the civil and military administration was brought about.

*esse, quam præfectura. Est enim multiplex nomen: Greve enim dicitur de scire, de waepentagiis, de hundredo, de burgis, de villis."*

In the statutes the appellation *cyninges-gerêfa* is accordingly not unfrequently carefully added to distinguish the royal *gerêfa* in the popular court from private *gerêfas* (Alfr. 22, 84; Cn. i. 8, ii. 33). The county administration of the united kingdom afforded, as the royal rights were increasingly developed, the most urgent occasion for the appointment of such an official, who was called by the king in his public edicts "his *gerêfa*:" "If one of my *gerêfas* will not do this, he is guilty of disobedience towards me, and I will find another who will" (Athlr. ii. 26). Equally significant in relation to the official status of the *gerêfa* is the official penalty or punishment for disobedience, with which he is summarily threatened in case he allows himself to be bribed (Athlst. v. 1, sec. 3); if in his office of judge he passes an unjust sentence (Edg. iii. 3); if he does not keep the proper court day (Edw. ii. 7, 8); if he does not collect the fine for refusal of justice (Edw. ii. 2); and if he neglects his duty in maintaining the peace (Athlst. ii. 26, pr. v. 1, sec. 2; vi. 8, secs. 4, 11). The frequent mention of the punishment for disobedience (*ofer-hyrnes*) and deposition in case of non-fulfilment of duty, mark the personal position of this powerful officer. Although with the ever-increasing importance of the office an eminent local man was generally chosen to fill it, and at times and in certain localities regard might be paid to the wishes of the county assembly, yet there is here even less appearance of an elective office than in the case of the Ealdorman.

In the official business of the Shir-*gerêfa* his financial duties and the management of details of business stand in the foreground. Whenever royal demesnes (Athlst. ii. pr.), folkland, usufruct, and other royal dues, have to be superintended in a county district, the Shir-*gerêfa* is the controlling official, unless a more special administration has been organized. Without prejudice to the Ealdorman's office, he was always regarded as the responsible officer of accounts. The same intimate connection with the royal revenues brings the Shir-*gerêfa* also within the sphere of the military, legal, and police jurisdictions.

1. When the military array was called out, the first duty was to collect the fines for neglecting to appear, and money contributions for the equipment of the soldiers, which came in when the contingents were apportioned ("*Tributa expeditionalia*," Cod. Dipl., No. 362). In the whole business of equipping and apportioning the contingents the Shir-*gerêfa* acted as the Ealdorman's assistant. Where delay would be



dangerous, he occasionally leads his troops in person against the invading pirates. For like reasons he heads the hastily summoned soldiery for the pursuit of peace-breakers (*Athlst.* vi. 8, sec. 4). The employment of the militia organization for police purposes necessarily required a local officer. In later times, when the Earl more and more retired into the position of an upper governor, the Shir-gerêfa, sitting with the Thanes in the county court, probably conducted the current business of the militia and police administration as completely and as regularly as he certainly did the legal business.

2. In the legal department the getting in of fines (*Edw.* ii. 2) and the confiscation of forfeited estates (*Codex Dipl.*, No. 328, 1258) was without doubt the primary business of the Shir-gerêfa. A further duty was to carry out the various sentences of the court (*Athlr.* i. 4, pr. sec. 1; *Cn.* ii. 38).

In his presence contracts of sale and exchange bargains were concluded (*Athlst.* ii. 10; *Edm.* iii. 5). The Ealdorman and the bishop are the regular presidents of the great county court; but even here the Shir-gerêfa, according to the records, is the assistant of the Ealdorman (*Codex Dipl.*, No. 765), and his presence in the capacity of financial officer is indispensable.

But we find him already in the older statutes as the sole justiciary of the king in the popular court, especially in transactions touching fines and forfeits (*Withr.* 22; *Alfr.* 22, 34; *Edw.* i. pr.; *Athlst.* ii. 22). In later times, the more the Ealdorman is restricted to the military command of the greater provinces, the more entirely does the Shir-gerêfa become the regular leader of the Shir-gemôte, and down into the Norman times there exists a condition of things, in which the holding of the county court by the Shir-gerêfa is regarded as a time-honoured custom.

3. In the business of maintaining the peace, the gerêfa is again the coadjutor of the Ealdorman. He must in his shire "before all else undertake the responsibility that all keep the peace" (*Athlst.* vi. 10). Police functions especially are allotted to him, which would be hardly suitable to the Ealdorman in his high and princely position, such as tracking cattle-stealers (*Athlst.* vi. 8, sec. 4); taking steps against the harbourers of thieves (*Athlst.* vi. 8, sec. 2), the control over the completion of bargains of sale and exchange, etc. "If there be a man there who is untrustworthy towards the people generally, the king's gerêfa shall go forth and take surety for him" (*Athlr.* i. 4). As royal executive officer he had also to assist the Church in getting in its dues and in other civil matters (*Athlst.* i. pr., sec. 4; *Edg.* i. 3; *Athlr.* viii. 8, 32; *Cn.* i. 8). (2)

(2) As to the position of the Shir-gerêfa *Spelman's Glossarium*, under the word "grafio" contains abundant material, which is the basis of all the

If the administration of the county in these points was centred more and more in the hands of the Shir-gerêfa, this must certainly be true, in a still greater degree, of the inferior local jurisdiction in the Hundreds. In the most prosperous period of the Anglo-Saxon kingdom, the Hundred Court was held twelve times a year as the common court for ordinary disputes between the freemen (Edw. ii. 8; Edg. i. 1; Cn. ii. 17). By degrees the more special obligations to be fulfilled by the Hundreds accumulate—to maintain the police control, to bring their members before the court, and to pursue thieves (Edg. i. 5; Cn. ii. 20; Hen. i. 8, sec. 2; Will. i. 22, iii. 3, etc.) It might have been supposed that, in view of this, each Hundred had a Hundred-gerêfa appointed by the king, but this is not anywhere mentioned in the records. In the “*Constitutio de Hundredis*” (Edg. i. 2, 4, 5), a “*hundredes-man*” is named, but in intimate connection with the tithing-man of the militia, and appointed for special police-business, and it appears that by this name a special officer of the militia is intended, who may be compared with the “*chief constable*” of later centuries. But on the other hand, where the presidents of the Hundred Assembly generally are referred to, the “*Shir-gerêfa*” is not definitely

English traditional explanations of the subject (see also Kemble, “*Anglo-Saxons*,” ii. c. 5, especially the list of names of the Shir-gerêfas in the eleventh century, Kemble, ii. 141–143). The disputed points are the following:—

1. As to the derivation of the word *gerêfa* (as of the German “*graf*”). The derivation from “*grau*,” or “*graviu*” in the sense of *senior* has been set aside by Grimm. The derivation attempted by Grimm from “*râvo*,” *tignum*, *tectum*, *domus*, *aula*, according to which it should mean a “*comes*,” or “*socius*” (*Deutsche Grammatik*, ii. 736; *Rechtsalterthümer*, p. 753), is quite as far-fetched and incredible as that of Lambard from “*gereocan*” *regere*; and that of Kemble from “*rôf*” or “*rêfan*,” *clamor*, *clamare*, *bannire*, *bannitor*. Spelman derives it from “*reâfan*,” to rob, in the sense of the later feudal “*distress*” as applying to the collector of the royal fines. With this would agree the later usual form, “*reeve*,” as would also the real position of the *gerêfa*, which is rendered into Latin by *exactor*. This corresponds also to the etymology of the word “*Schultheiss*,” in Germany (see Max Müller, *Lectures*, ii. 231).

2. Whether, in addition to the Shir-gerêfa, there existed other principal

officers of the shire, is a doubtful point suggested by the fact that in the statutes sometimes a “*shirman*” is mentioned, as in Ina, cap. 8, where the *shirman* or other judge (*Dëman*) is intended. In the *Codex Dipl.* an “*Æthelwine scirman*” occurs (No. 761); but in another place he is called “*Æthelwine Shir-gerêfa*.” In these same statutes occur the forms “*scirigman*,” “*sciresman*,” “*scireman*,” (Nos. 761, 782, 929, 972, 1288). By these names may simply be meant the Shir-gerêfa, as Kemble and Schmidt conclude; but it is also possible that there was a special “*scirman*” for military organization, and for certain police functions, as an elective officer of the old order.

3. The opinion formerly current in England that the Shir-gerêfa was originally an elected popular officer, has no other foundation than the passage quoted above (*Leges Edw. Conf. de Heretochia*, c. 32a), “*sicut et viocomites provinciarum et comitatuum eligi debent*,” the style alone of which sufficiently designates it as expressing merely the opinion of the private author. The Anglo-Saxon accounts taken from statutes, documents, and historians all indicate a free appointment and deposition of the Shir-gerêfa at the will of the king.

mentioned, but the "king's gerêfa." "I will that every gerêfa hold a gemôt every four weeks" (Edw. ii. 8); "that a gemôt be holden in every Wapentake, and that the twelve oldest Thanes go thither and the gerêfa with them" (Athlr. iii. 3). In the general regulations for magistrates, gerêfas are, as a rule, mentioned (Edw. i. 1; Edw. ii. 2; Athlst. ii. 26, iv. 7, v. 1, vi. 11). We can only conclude from such language that the administration of the Hundreds was not thoroughly uniform throughout the country; as some Hundreds, and many districts combined with the Hundreds, had special magistrates. But apart from this, the official business of the Shir-gerêfa, his especial financial, legal, and police duties were so bound up with the Hundred Assembly, that he must have been the actual prefect of all Hundreds which were not exempted from his control. This is identical, too, with the state of things which in the Norman period we find to be the customary and ancient one. (2<sup>a</sup>)

III. *Royal Gerêfas* for narrower districts and townships, and for special administrative purposes, in addition to the Shir-gerêfa, arose from the form which the royal rights and the territorial conditions had taken, all which have been described above (Chap. III. sec. 3).

Firstly, in Hundreds, and even in still greater sub-districts of a county, special magistrates might be appointed, as the royal gerêfa in the Thing of the five burgs (Athlr. iii. c. 1), which was a special district of Danish colonists, where he was even appointed to sit side by side with the Ealdorman. According to another principle, the great royal forest-districts led to the appointment of the Swân-gerêfas, who occur as early as Ecgberht's time (Codex Dipl., 219), but who in the later "Constitutio de foresta" of Cnut are the chief officers for the administration of forests. The gerêfa system extends also to

(2<sup>a</sup>) Whether the Shir-gerêfa was the regular president of the Hundred Court, or whether there were special under-magistrates in the Hundreds, cannot be categorically decided. But the negative proposition can be maintained, that the very frequent mention of the Hundreds and their gemôtes in later times must have led to the mention of the Hundred-gerêfa, had such an officer belonged to the constitution of the Hundred. Doubts might arise, in view of the large number of Hundreds, in each of which a single man could not hold a court every four weeks, but in the majority of counties the number was so moderate that there would be no impediment. In Kent the numerous small Hundreds

were united into "Lathes" for the administration of justice. Later times prove that the sittings of several Hundreds were generally taken together, and held at one and the same time; and in like manner later conditions of things show us that the sheriff could appoint substitutes, on his own responsibility. The legal collections of the Norman period do not afford reliable proof on this question. In the *Leges Hen. i.* 8, sec. 1, we read, "*Proxit Hundredo unus de melioribus et vocetur aldremanus*;" 91, sec. 1, "*Aldremanus hundredi*." An Ealdor of a Hundred only occurs in Edg. iv. 8, 10, and evidently signifies the magistrate, and not a particular title of office.

townships; Burh-gerêfas, or simply gerêfas, are found in towns which had formed round a burg, on old demesne lands, folkland, or under special royal protection; a Port-gerêfa in towns which, as commercial centres, were of special importance for the collection of the royal dues, as in London and Canterbury. In London he has the position of a Shir-gerêfa. The royal letters were addressed to "the Ealdormen, Bishop, and Port-gerêfa;" and high officers of the royal household, as well as great Thanes, are mentioned as holding these lucrative posts. A Wic-gerêfa is found as royal magistrate in smaller townships. In many considerable towns the royal magistrate of the Burh-gemôte retained even in later times this less pretentious title. Even in London in the seventh century the king's Wic-gerêfa is mentioned, whose place was in later times taken by the Port-gerêfas.

A similar system of gerêfas existed, as we have mentioned, for the great private landed estates. Bishops, Ealdormen, and greater and lesser Thanes had to raise dues from their estates, to settle the disputes of their dependants, and to take upon themselves the responsibility in the numerous proclamations of the military array, and of the maintenance of the peace. Such lords' "Tungerêfas" might be simple bailiffs. In greater townships, and where an extended jurisdiction (*saca et seca*) had been accorded them by royal grant, they might actually have the importance of a royal Wic-gerêfa. The term "secn-gerêfa," however, only occurs once in the old Corporation Statutes of London. The landed Thane, *teo*, is himself regarded as the responsible wielder of an official authority (Athlst. iv. 7). (8)

The universal system of royal gerêfas pervades the Anglo-Saxon administration in all directions, and forms a remarkable feature in it. From the days of Ælfred numerous

(3) As to the special gerêfas for districts, towns, and administrative functions, see Kemble ("Anglo-Saxons," ii. c. 5, pp. 144-154).

The Burh-gerêfa is less frequently mentioned in statutes and records than the importance of the Burh-gemôte would lead us to expect. Some names of gerêfas in royal Burhs are given by Kemble (ii. 146). A Port-gerêfa is met with in London, Canterbury, Bath, and Bodmin (Kemble ii. 148). In London the two Port-gerêfas appear in early times in a certain connection with the Shir-gerêfa of Middlesex (in the so-called *libertas civitatum*, appendix, xxiii. 4).

The Wic-gerêfa is met with also in Winchester (Chr. Sax. 897; Schmid,

Glossarium, 598).

The private magistrates of the Bishops, Ealdormen, and Thanes may also include the humblest bailiffs. The *gesithcundman*, who (Ine, 63) is described as travelling about "with his gerêfa, his smith, and his nurse," certainly took with him no magisterial officer, but merely a menial servant. That the landowners might be represented by their gerêfa in the royal court in taking oaths in certain special cases is recorded already by Athlr. i. sec. 1. Much that is incapable of proof touching the election and business of the lords' gerêfa is narrated (as usual) by Anstey, "Guide to Constitutional History," p. 125.

*judices, præfecti, præpositi*, are appointed, all of which names are but Latinized expressions for a word of wide signification—"gerêfa." The body of these officials forms a uniform whole, as is shown by the fact that in Eadgar's time the King confirms the appointment of the whole body of his father's officials (Edg. iv. 2, pr.). The financial rights and the general development, of the royal powers had led to this system of royal appointments. The Anglo-Saxon Chronicle makes King Withred say at the National Assembly at Baccanceld in 694: "It is the king's business to appoint Eorls, (?) Ealdormen, Shir gerêfas, and Judges" (Monum. Hist. Britt. i. p. 324). In an Anglo-Saxon record (Cod. Dipl. 996) we find the same: "*illius autem est, comites, duces, optimates, principes, præfectos, judices sæculares statuere.*" This record is, indeed, not genuine, and betrays the hand of a cleric; but, like the most of these documents, it is of very ancient date, and expresses the conceptions which were regarded as traditional. The expression "royal Thaneship" embraces frequently in this sense the sum total of magisterial offices. Offences of officials are generally to be visited with fine and loss of thegnship ("*thegenscypes et omni judiciaria dignitate privatur,*" Leges Hen. i. 34, sec. 1). In close connection with landed property this thaneship spread over the whole country, and supplanted the popular offices and popular elections of the ancient constitution. Of elections in the modern sense of the term there is no reliable trace to be found, neither in the imperial nor in the county administration (Palgrave i. 118).

The fully developed Anglo-Saxon political State is a joint creation of great landed interests and a royal prefectural system, scarcely containing any of the characteristics of a Germanic constitution such as Tacitus describes. The actual State is embodied in comparatively few persons, namely, the Bishops, Ealdormen, and Shir-gerêfas, appointed by the King. The local administration ramifies into a system of gerêfas in narrower circles, interwoven with a similar system of manorial magistrates. A lowering of the political importance of the freehold tenants, of the landless freemen, and of the whole labouring population in consequence, is unmistakable. But the constitution of the courts modifies this character. In the Hundred Court, and even in the Manorial Courts, the passing of sentences is not an individual act of the magistrate, but is a determination of the freemen acting in the capacity of judges and compurgators. In the County Court the royal magistrate is surrounded by still more influential Witan as Judges. Similarly the county administration in military affairs and the maintenance of the peace is carried on in active co-operation with the Thanes of the county,

and probably too with deputations from the Hundreds and analogous districts. On a higher level the King administers justice in the Witenagemôte with the counsel and consent of still more powerful prelates and great Thanes. That this strong aristocratic element still co-exists with an universal system of royal magistrates is explained by the general composition of the State. There existed a number of powerful landowners, but their landed interests were not concentrated at one point. Originally there were no great estates, which might be compared to the "*possessiones*" which existed in the old Roman provincial soil. In the territory of the small kingdoms of former days a numerous middle Thaneshood had grown up with an average possession of five hides each; but there were no separate great estates, whence a territorial supremacy could have proceeded. After the union of the kingdoms the royal possession and the royal power towered so far above the most powerful great Thane as to render it practicable to maintain a central administration by means of governors and appointed magistrates. But on the other hand the Prelates and the Thanes were, as a body, so numerous, so richly endowed with estates, and so firmly established in their landed rights, that as a class they almost engrossed the magisterial offices. In harmony with this condition of things is the concentration of the central authority, "the King in the Witenagemôte" as an assembly of landlords invested with offices and officials possessed of land (below, cap. VI.). Its composition is grounded on the right of appointing, of summoning, and of granting, which the King exercises within the army, law, police, and Church constitution; and which again ministers to the united influence of Prelates and great Thanes at court and in the Witenagemôte. The preponderance of these families, often closely connected with each other, compels the King more and more to fill the important offices "with their assistance," and thus at an early period a state of things is established in which the power of the great landed interests does not show itself in the form of concentrated feudal small states, but in a corporate form with a controlling influence upon the exercise of royal powers.

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## CHAPTER V.

*The Anglo-Saxon Church.*

THE conversion of the heathen Anglo-Saxons by resolutions of the King in the National Assembly had led to the foundation of a bishopric in each of the several kingdoms. Towards the close of the seventh century these bishoprics were united under an Archbishop Theodore, upon whom the Pope's choice had fortunately fallen, and became in consequence an element of centralization which wrought powerfully in preparing the way for the subsequent union of the kingdoms. The Church thus bound together was and remained a national Church, of an essentially different nature from that existing among the Britons and in Roman countries. Her origin, her institutions, and her establishment were the free act of the organized powers of the State. Her clergy belonged, with few exceptions, to the native families. Her constitution did not originate in an adoption of foreign institutions, but in national necessities. In this Church also, the wise and the ignorant, the teacher and the disciple, certainly stand in relations to each other, to which the organization of the militia, the courts, and the maintenance of the peace are inapplicable. As a school for the people, the Church must at all times be organized from above downwards; she performs her functions only by means of officials who are dedicated entirely and solely to her service, and independent of birth and property. The union of the kingdom only affected the constitution of the Church so far as to gradually remove undue inequalities in the formation of the dioceses, and to bring the ecclesiastical districts into as much harmony with the division into shires as appeared necessary for a common transaction of spiritual and temporal affairs.

I. *The Institutions of the Church* comprise the three gradations next mentioned.

1. The *bishoprics*, which originally were identical with the territory of the separate kingdoms, remained unchanged in

the smaller ones, whilst in the greater kingdoms of Wessex and Mercia the administrative principle of division into shires led to a corresponding increase in the ecclesiastical districts by a division into eight dioceses. And so at the close of the Anglo-Saxon period there were in existence, with some changes, seventeen dioceses, the majority of which began as early as the time of Theodore to unite and form provincial synods under the direction of the Metropolitan of Canterbury. A second archbishopric for the group of northern dioceses became consolidated after many vicissitudes, but it was unable, in the disordered condition of affairs in the north, to attain, either externally or internally, to perfect equality with Canterbury. Every Archbishop and Bishop is, according to Anglo-Saxon ideas, the original holder of ecclesiastical authority. In temporal matters, too, he was "to take part in the sittings of the court, adjust differences, and restore peace in conjunction with the temporal judges, prevent wrong-doing in taking of oaths and in trials by ordeal, connive at no unjust measure or false weight; in short, to keep watch over the maintenance of spiritual and of temporal law." (Thorpe, "*Institutes of Ecclesiastical Polity*," ii. 312.) (1)

(1) As to the formation of the Anglo-Saxon Church, see especially Palgrave, "*Commonwealth*," cap. xi.; Kemble ii. c. 2; and Henry Soames, "*The Anglo-Saxon Church*" (1845-6); Lingard, "*History of the Anglo-Saxon Church*" (1845); Dugdale, "*Monasticon Anglicanum*" (Edited by Calley, &c., London, 1817); Lappenberg, i., pp. 185-195. ("*Die Kirchliche Geographie der Angel-Sächsischen Zeit*."). The historical grouping is as follows:—In the little kingdom of Kent (1) the archbishopric of Canterbury was and continued to be the mother-bishopric of the whole of England, besides which, in quite early times, (2) the bishopric of Rochester had arisen. For Essex arose (3) that of London; for Sussex (4) Selsey, in later times Chichester. In East Anglia (5) the bishopric of Dunwich in Suffolk was first founded, from which again for Norfolk (6) that of Elham, later Norwich, was separated off. For the great territory of Wessex (7) the bishopric of Dorchester was first founded, from which (8) that of Winchester was severed; then was further founded a third (9) bishopric at Sherborne, later removed to Old Sarum and then to Salisbury. From the last named again were separated off (10) the bishopric of Wells, and (11) of Kirtou, afterwards at Exeter. The adminis-

trative principle of the shires, according to which these dioceses contained one, two, or three counties each, was here the rule. In Mercia from the (12) head bishopric of Lichfield (in later times Chester and later Coventry) were severed the bishoprics of (13) Worcester, (14) Hereford, and (15) Lincoln. The northern kingdom of Deira had retained as its chief bishopric, that of York [16], which extended also over Bernicia, and after the formation of the great kingdom of Northumbria, stretched still further. As a separate bishopric, arose that of Lindisfarne [17], later Durham. A considerable portion of the great diocese of York went over to the Scotch bishops. In an anomalous position stood the Bishop of the Isles of Sodor and Man, who after the Norman period was subject to the Archbishop of Drontheim, and came later under private patronage. There is here to be found no connection of any sort between these and the bishoprics of the old British Church. [Palgrave, i. 152-154.] The abacy of Ely was as late as the reign of Henry I. first raised to the rank of a bishopric; and in 1109, the bishopric of Carlisle was founded for Cumberland. The four bishoprics of Wales, by the conquest of the country some centuries later, were incorporated with the English



2. The *monasteries* and religious corporations were of special importance in this epoch. A monasterial institution was the first need of Christianity, as a gathering-place and shelter for missionaries, teachers and scholars. The exigencies of sustenance, personal safety, and mutual help in their mission-work, kept on foot for a long time this mode of living in common; the late origin and very diverse organization of the parish Churches was favourable to it. The number and endowment of monasteries, and especially of nunneries, is ever on the increase. At an early period men and women, even of royal lineage and from the families of the great Thanes, show a predilection for entering upon monastic life. The clergy of the great cathedral churches retain in later times their original monasterial connections and institutions, according to which the prebendaries continue to bear the title of "monks." According to the conditions of society of those days, the foundation of superior schools could be effected only by a union with the members and possessions of such corporations; just as the beginnings of charitable and pious foundations could only gain stability and endurance in the permanent conditions of property afforded by such corporations. "In the neighbourhood of the cathedrals were gathered together the maimed, the lame, the blind, the homeless and friendless, to be fed, clothed, and cared for for God's sake" (Kemble, ii. 440). This may explain the disproportionate favouritism shown to these corporations by the most enlightened monarchs, such as Ælfred the Great, especially under the heavy visitations of the Danish period. The Anglo-Saxon period concludes with a great number of permanently endowed monastic cathedral corporations, irregularly scattered throughout the kingdom, and with very unequal, and in some places over-wealthy possessions. (2)

**Church system.** The formation of the offices here was exactly opposite to the process of formation in the State—first the formation of the Bishops' sees, then that of the parishes; in a much later period that of the arch-deaconries and rural deaneries. The arch-deaconries are associated with the county districts, and the rural deaneries with the Hundreds of later times.

(2) The monasterial foundations (Kemble, ii. c. 9) were originally promoted by the customs of the early missionaries. The clergy lived in communities, even when they were not monks, and followed the rule of the Benedictine or some other order. Under the protection of the kings this spirit of community, especially in the highly

honoured nunneries, assumed a national character. The real need of the times we must estimate according to the views of an Ælfred, and not from the later and changed position of affairs. Asser tells us that Ælfred was wont to dedicate a full half of his royal revenues to ecclesiastical purposes: of this he assigned a fourth to the poor, a fourth to the two monasteries he had founded, another fourth was set apart for the school founded by him, and the remaining fourth for the neighbouring churches and monasteries and their ministers. Both spiritual and temporal nobles spent considerable sums in charity, in its primary signification; a portion of the booty made in war, and a portion of the fines payable to the

8. The foundation of *parish churches* in England took place slowly and imperfectly. For a great length of time, according to Bæda, the bishops still wandered about their dioceses with their assistant clergy; and even in the middle of the seventh century Saint Cuthbert journeyed from village to village. But from the days of Archbishop Theodore the creation of settled parishes began in greater numbers, slowly extending from the southern parts of the country towards the north; endowed often with parcels of land by generous Thanes, they became after the introduction of the system of church-tithes more uniformly enriched by the tithes of their parochial districts. The Canons of Archbishop Ecgberht (Excerpta Ecgberhti, Thorpe ii. 100) show us what the early Church of those days aimed at. The parish church was to be endowed with a hide (*mansus*) of land, and this hida should remain free from all public burthens, whilst all property beyond this amount should be subject to manorial dues and State burthens. The laws of Eadgar and Cnut of a later period contain the rule that every landowner may endow a church situate on his Bôcland, with a third of the tithes, provided there be a graveyard united with it; where there is no graveyard, the tithes are payable as before to the "parent" Church, and a new income is to be provided by its founder for the chapelry.

These attempts, similar in character to the ordinances of the Emperor Louis (Pertz ii. 626), were, however, only partially successful, and even at the close of the Anglo-Saxon period the endowments were somewhat scanty compared with the possessions of the cathedral churches and abbeys. Meanwhile, the Church income, which was at first centralized, becomes more and more distributed amongst and firmly attached to the bishops' sees, monasteries, and parsonages. A settled endowment of the parsonages became the rule in the ninth century. In Domesday Book an "*Ecclesia sine terra*" is a rarity. From the manner of the foundation there resulted an extensive right of patronage over the benefices. The Norman Domesday Book, in which the list of them is imperfect, specifies hardly more than 1700 churches, endowed with parcels of land of from five to fifty acres, and showing a very unequal distribution of the ecclesiastical benefices in the various parts of the kingdom. (3)

Church, was also ordered to be paid to the poor. All such foundations, however, found no stability in the system of temporal administration, for such contributions were speedily spent and forgotten; hospitals and almshouses belonging to the monasteries and cathe-

drals formed just those permanent institutions on which the system depended. (Kemble, ii. c. 11.)

(3) As to the nature of the ecclesiastical benefices, Domesday Book alone gives us reliable information (Ellis, Introd. i. pp. 286, 295). Glebes

These institutions of the Church, as regards her property as well as her ministers, are firmly bound up with the secular state.

II. The Property of the Church attained an extent which, at the close of the Anglo-Saxon period, towers far above the importance of the royal revenues. Intellectual and industrial labour alike require property for their maintenance and development; but intellectual labour has been always compelled to associate itself with the existing system of property. In the Middle Ages it was obliged to acquire great landed estates in order to keep on terms of equality with freehold owners. The amount of Church property, as a whole, long retained that relative importance which the intellectual life, centred in the Church, might well claim, in comparison with military life or industrial pursuits. The separate elements may be grouped in the following order:—

1. The *landed property* of the Church had to maintain itself on an equal footing with the fully secured allodial estate, at a time when such property was a necessary condition of full legal capacity and equality. But it is an old experience that recently converted races know no bounds in their liberality towards the Church. Following the example of King Æthelbert, who bestowed his palace with its lands upon St. Augustine, the Anglo-Saxon kings and magnates also made rich gifts. The manifold Anglo-Saxon records lead one to suppose that almost every princely personage bestowed some such gift on departing this life. A person entering a monastery not unfrequently brought his whole fortune with him; the children of distinguished parents brought at least a donation of lands. Recovery from severe illness and escape from disasters, as well as joyous events, were commemorated by donations, which the clergy, whose co-operation at the making of wills was indispensable, commended to the consciences of rich sinners agitated by the fear of death. Even the severe losses

of more than 50 acres (as one of 88, one of 100, and another of 120 acres of pasture land) are solitary instances; on the other hand, a church without land is also a rarity in the great register of land. But churches without land appear to have been omitted, owing to the original object of the book. In the legislation, the continual increase in the number of parish churches is visible in the distinction of various classes. In a principal church (*kildafod mynster*) breach of the peace is visited with a penalty of £5; in ordinary churches of 120 shillings; in still smaller of 60 shillings, and in chapels of 30 shillings (Athl. viii. 5; Cn. i. 8, secs. 1, 2; Hen.

79, sec. 6; App. iv. 3). The maintenance of the parish church afforded the first reason for the participation of the community in the control of the Church property. The analogy of the parochial system of northern countries and of the later rights of the parishioners in England justify the conclusion that the Saxon parishioners also participated to a certain degree in the management of the Church property which had been formed from their contributions. The Church of the later Middle Ages, when her pretensions were at the highest, would scarcely have recognized such participation, had it not been founded on ancient custom,

which the Church experienced through the destructive frenzy of the Danish pirates were soon made good by donations from converted Danish magnates. According to the manner of property in those days, to landed estates were attached reserved dues, services, and rights of protection over tenants. Profitable rights of this description might also be the immediate subject of the bounty. Royal donations especially include tolls and market dues, forests, harbours, fisheries, mines, and rights of pasturage. There are further attached to great landed estates, the magisterial rights which had become extended by grants, and the whole lordship over the soil in its Anglo-Saxon conception. Thus arose the landed property of the Church, almost continually growing and increasing, until, in the case of many cathedrals and monasteries, it was equal to that of the temporal great Thanes; and compared with it, the single parcels of land belonging to the parish churches bore about the same proportion as the small yeoman freeholds of that time bore to the lordships of the *Thaini regis*. (a)

2. The *payment of tithes* was almost as important for the permanent and uniform endowment of the ecclesiastical institutions as the possession of landed property. As in the whole of Christendom, so in England as early as the end of the eighth century, the united exertions of the clergy led to a recognition of the right to tithes by the National Assemblies of Mercia and Northumberland. A decided legal recognition was first made in Æthelstan's "*Constitutio de Decimis*," since which time the temporal power agreed likewise to these taxes being raised by the royal *geréfas*. One third part of the tithes was to be expended on repairing the church, a second for the ministers of God, the remaining part for God's poor and for needy labourers (Athlrd. viii. 6). Nearly every subsequent reign confirmed afresh the legal liability to tithes with the assent of the Witan. The Church accordingly gained a

(a) The landed property of the Church is dealt with by Kemble, ii. c. 10. To give an instance of the unequal distribution of landed property, it will be sufficient to mention that the district of Chilcombe (a part of the possessions of the bishopric of Winchester) is reckoned at 100 hides (Cod. Dipl. 642). However, such a concentration of estates, which might have led to separate territories was just as little possible with ecclesiastical estates as with temporal magnates, from whose grants they principally arose. It is true that King Withred of Kent and Æthelbald of Mercia

declared their wish to free the ecclesiastical estates within their realms from "temporal burthens, labours, duties, and contributions," but hereby only burthens attached to land were meant, and it is expressly declared that the three common burthens, "*expeditio exercitus, burgorum constructio, pontium refectio*," are not included. Few grants to the Church can be cited without the reservation of these common burthens, which later jurists have styled the "*trinoda necessitas*" (Palgrave, i. 156, 157, 160, 161).

right of direct taxation much earlier than the temporal State. (b)

3. Besides the tithes there were *periodical contributions* of minor importance, as burial-service fees, candle-dues, and plough-alms, contributions which, at first depending on liberality, became local customs, and were at last recognized in the decrees of the National Assembly. To such belongs also a Church rate (*Ciric sceat*), which was to be paid on St. Martin's day by every free household, and regulated in a certain proportion to the produce of household and farm; but a general carrying out of this measure, in spite of legal recognition, was not achieved, and in Norman times it is only met with as a customary tribute paid by certain individual estates. As occasional sources of income may be mentioned the numerous gifts made by believers, consisting of movable goods, such as crosses, rings and jewels, provisions, etc.; which, in the wills of the Anglo-Saxon magnates, are extended to presents of whole herds of horses, oxen, sheep, and pigs—"pro salute animæ." (c)

III. The Political Position of the Ecclesiastical Ministers shows a more complete and closer union between the Church

(b) The Church tithes are first mentioned in the written law in a synodal decree of the year 786 (Selden, c. 8, sec. 2), which proves their confirmation by the temporal power by decrees of the kings of Mercia and Northumberland in their National Assemblies. Liability to tithes is next recognized in the law of King Eadward and Guthrum about the year 900 (E. et. G. c. 6), briefly mentioned in Athl. iii. 1, but at full length in an ordinance respecting tithes (Athl. i. secs. 1-5) with two rather different texts. The ordinance speaks only of the "assistance" of the bishops, and is addressed to the *geréfas* as an official notice. Later recognitions are to be found in Edw. i. 2; Edg. ii. 1, 2, 3; iv. 1, secs. 3, 4; Athl. v. 11; vi. 17; vii. 1, secs. 2, 4, 7; viii. 6-9, 14, 15; Cn. i. 8, 11; Edw. Conf. 7. 8. That a third of the tithes is to be expended on repairing the church is repeated by Athl. vii. 6; but the fines payable to the Church shall also be used for the same purpose (Athl. v. 57), that the bishop especially (Edm. i. 5), and every one generally, should contribute to the repair of the church, by Cn. ii. 65.

(c) Among the small periodical contributions, the *Ciric-sceat* has been the subject of a prolix discussion, which is connected with the disputed posi-

tion of the "Church-rate" of to-day. Its nature has been nowhere exactly described, yet there are many reasons for believing that it was intended to be a gift of the first-fruits of the field after the model of the Mosaic law. The mention of it in the statutes is exceedingly frequent (Ine, 4, 6; Edg. ii. 2, 3; iv. 1; Athl. vi. 18; vii. 4; viii. 11; Cn. i. 10; ii. 11). The collection of it was especially inculcated upon the *geréfas* (Athl. i. 4), under threat of excommunication (Edm. i. 2). It can therefore hardly be denied that the legislation intended to recognize a general Church contribution, but that its levying found an obstinate resistance in the opposition the yeomen especially showed towards it, and was accordingly, in spite of all ordinances, only partially carried out. Kemble (ii. 460, suppl. D.) endeavours to maintain a thoroughly fictitious view. A good discussion of the question is found in Schmid (Glossarium, 545-547). From the success that attended their imposition, the innumerable absolution moneys for fasts and penitences may be included in the periodical Church tributes. From the multiplication of these means of grace the penitentiary books of this period give an extraordinary picture of the abuse of an idea originally proper and moral.

and the laity than in most countries of the continent. Whilst Christianity in other countries took its rise in the poorer classes of the population, in England the conversion began its work with the kings, their households and followers, their Witan and Comites, and spread downwards from them into the communal and family life of the people. It was natural, therefore, that the result should be a close connection with family, community, and government. The clergy belonged to the nation's "family-life," for, from the very first, they were taken from all classes of society, from the king's son down to the bond-theow. Monastic life, with its strict observance of the rules of the order, certainly demanded the sacrifice of family ties; but, on the other hand, the secular clergy were, and continued to be, to a great extent, in the married state. The injudicious zeal of Dunstan, indeed, endeavoured to bend even the secular clergy under the rules of the order. In a time of great abuses and a threatened alienation of the Church, the clergy should belong exclusively to the spiritual profession. The force of custom was, however, so strong in the national Church that a score or two of years later the ecclesiastical régime was not materially changed, and celibacy did not become an established rule of the Anglo-Saxon Church. The clergy belong to the civil community through the liability of their corporate estates to the payment of common burdens. With unimportant exceptions, the deeds of grant even to the most favoured monasteries declare their ever-recurring "*trinoda necessitas*"—the perpetual liability to "Bryegbote, Burhbote, and Fyrd"—to which are joined many other services reserved to the King; whilst on the other hand the Church participated in all rights and privileges of landed property. Hence was preserved a feeling of common interests and rights bound up in a close bond of union. The Canons show that on the part of the Church there was no attempt to obtain fundamental immunities in this respect, even though a monastery here and there endeavoured in its deeds of grant to acquire some special benefit. As an established principle, the clergy remained subject to the secular authority, viz. the royal military, legal, police, and finance control; subject, however, to the following general rules:—

1. The obligation of the clergy to military service was not abolished by any Anglo-Saxon statute, although no compulsion was used towards the higher *ordines*. The latitude of administrative arrangement of the militia in the County and Hundred Assemblies readily allowed of substitution; the interests of neighbours, however, took care that the ecclesiastical estates furnished contingents for the national defence

as nearly as possible *pro rata*, and that the favour shown to the Church should at all events not increase their own obligations. (1)

2. The judicial duties of the clergy were as follows: in a dispute with the laity they must seek justice in the Hundred and Shir-gemôte, to the criminal jurisdiction of which they were subjected, equally with the layman. Clergy appear amongst the judging Witan (Alfr. 88, sec. 2). They appear especially active in the administration of oaths, and in conducting the ordeals (Edw. Conf. c. 9). Clerics perform the functions of notaries in cases of contract, grants, and wills, "*quoniam tabellionum usus in regno Angliæ non habetur*" (Matth. Paris, Hist. Hen. iii.), and appear also as taking depositions (Edm. iii. 5; Athlst. ii. 10); under their superintendence marriages are contracted (App. vi. 8). They are consulted as arbiters and councillors in actions at law. They are employed everywhere as clerks of the court. Even the office of Shir-gerêfa was, in certain cases, filled by clerics, and if the ecclesiastical canons in general forbid their exercise of that office, it is only a proof that such an occupation was legally permissible. A privilege is accorded the clerics only in the case of taking of oaths, in which the application of the ordinary principles would have led to hardships; but here at the same time the special credibility of a servant of God was taken into consideration. This purgation by oath was regulated and facilitated by the passing of special laws (Athl. viii. 15). Of more importance than such moderate favours, appears the peculiar legal jurisdiction, which was formed in the interests of the Church, in *causis ecclesiasticis*, and for clerical delinquencies. This was without detriment to the secular legal jurisdiction, and only applied to the new relations which arose from the ecclesiastical ordinances, and which could not be considered as suitable objects for the judgment of the national courts in the form they then had (Edw. et G. 12; Cn. ii. 48, 58). Beyond this an exemption of the ecclesiastics from the secular judicial jurisdiction was never established during the Anglo-Saxon period. (2)

(1) Immunity from military service was never directly stated (Palgrave, i. 156, 157). We find in times of danger the higher clerics frequently amongst the warriors and amongst the slain; yet a personal summons of the clergy is never spoken of. An obligation to furnish soldiers according to the proportion of ecclesiastical property is expressly mentioned, and sometimes even the customary number of the troops, as in a large grant to a mon-

astery, "*expeditionem cum duodecim vasallis et cum tantis scutis exerceant*" (in 821; Cod. Dipl. 272). To look to this was the duty of the Shir-gerêfa.

(2) As regards jurisdiction, Kemble (ii. 378) rightly remarks that the numerous precautionary measures contained in the statutes as to the manner of conducting law suits by clerics, afford a complete proof of their subjection to the secular jurisdiction, as an established principle. (He cites

8. The principle by which they were subjected to the secular criminal jurisdiction brought the ecclesiastics also under the police jurisdiction of the Crown. The duty of maintaining the peace was extended naturally and particularly to clerics. On their landed estates they were responsible for their tenants, servants, and dependants, with all the strict obligations that later legislation imposed for the maintenance of the peace. From the system of special peace proclamations, there resulted a further co-operation of the ecclesiastical and secular authorities to secure the peace of ecclesiastical persons, possessions, and seasons, but this was founded upon the "King's peace" (Will. i. 20). (8)

This universal interweaving of the clergy with the secular community led further to their employment in the offices of the middle and higher grades of the administration. In the County Assembly the Bishop, Ealdorman, and Sheriff preside together, but with this proviso, that matters of a purely ecclesiastical character are generally determined separately. Under these circumstances the Bishop could also take cognizance of purely secular matters, such as the control over weights and measures, the rules of inheritance, and other affairs, which appear in later times in England as remarkable extensions of the ecclesiastical jurisdiction. As the support of the ecclesiastical authorities is a duty of the Shir-gerêfa (Athlst. i. pr. sec. 4; Edg. i. 3; Athlr. viii. 8, 32; Cn. i. 8), so also it is made the Bishop's duty to superintend and support the Shir-gerêfas. The punishments for disobedience inflicted upon the gerêfa who neglects his official duties, or delivers an unjust sentence, are to be enforced by the Bishop (Athlst. i. 26; Edg. iii. sec. 8). It is not clear

Athlr. 18, 19; Athlr. viii. 19-24, 27; Cn. i. sec. 5; ii. sec. 41; Hen. i. 64, sec. 8; 5, sec. 7 *et seq.*; 57, sec. 9). Their endeavours to gain immunity from the secular jurisdiction can be perceived, however, in the following points. In disputes of the clerics among one another, the Church in early times insisted that the parties should refer the matter exclusively to the ecclesiastical superior (Canon, Edg. 7). The priest found guilty of murder was deprived by the ecclesiastical authorities of his priestly consecration, and handed over as a layman to the criminal jurisdiction (Alfr. 21; Athlr. viii. 26; Cn. ii. 41). Clerics were subject, in addition to the fines or penalties of the secular authorities, to a special Church penalty (Edw. et G. 3; Athlr. viii. 27; Cn. ii. 5, sec. 8). In the case

of capital offences they were to be confined in prison, until the sentence of the Bishop had been passed (Edw. et G. 4, sec. 2; Cn. ii. 43). But a recognized ecclesiastical court is not found until the Norman period (*Leges Will. I.* sec. 4; Hen. i. 57, sec. 9).

(3) In the province of maintenance of the peace, the express duty was imposed on the Bishops of restoring order, and, in conjunction with the secular judges, of preventing wrong ("Institutes of Eccles. Polity, Thorpe, ii. 312). The Bishops enjoy a special right of asylum in analogy to that of the Ealdorman. In addition to the King's peace the Church-peace is especially mentioned as God's command (Athlr. v. 10, 21; vi. 13, 26); and is even set above the King's peace (Cn. ii. 1, sec. 1; App. iv. 1, 31).



whether, and if so how far, these divided official functions, which mutually acted and reacted on each other, extended downwards into the Hundreds. But upwards they meet in the general National Assembly, in the appearance of the Bishops and greater abbots in the Witenagemôte among the King's Thanes, of whom they always take precedence.

The bringing of the clerics under the duties of the community led immediately to ranking the clergy according to the class relations of those times. As in the Anglo-Saxon thaneship public duty and office combine with possession of property to form a class privilege, so do they also among the higher ranks of the clergy. In the civil State, property leads to office; in the ecclesiastical, office leads to property, and places the Bishops and greater abbots upon an equality with the great Thanes, and the beneficed clergy with the ordinary Thanes of the county. The equalization of the Bishops with the Ealdormen—that is, with the highest dignitaries of the civil State—was brought about with completeness, and knew no exceptions. This was done in the matter of the Weregelt (App. vii. 2. sec. 3; Hen. i. 68, sec. 6); of the compensation for murder (Edw. Conf. 12, sec. 5); of the Bishop's Borg and Mundfyrd (Alfr. 3; Cn. ii. 58; App. iv. 11); of the Burhbryce (Ine, 45; Alfr. 48); of the gage of battle (Alfr. 15; App. iv. 12); the Bishop's right of asylum (Athl. v. 4; App. iv. 5); and the punishment for disobedience (Hen. 35, sec. 1; 87, sec. 5). In the same manner the position of the priest as "Mass-thane" was in word and deed established by law. He is worthy of the rights and the Weregelt of a Thane (Athl. v. 9; vi. 5; viii. 28; Cn. i. 6, sec. 2). The Weregelt was fixed among the northmen alike for the Mass-thane and the secular Thane at 2000 thrymsas (App. vii. 2, sec. 5), and in proportion to it was the higher value of the priest's oath (Wihtr. 16, 17, 18; App. vii. 2). The amount of the Weregelt, however, was a matter of dispute (Dialogus Eccl. 12; Thorpe ii. 92), the later opinion being that it was decided by birth-rank (Hen. i. 68, sec. 3). The lower orders of clergy had in the scheme of penalties the ordinary position of the *liber homo* or *ceorl*.

The National Assembly, finally, forms the central point in which the civil State becomes bound up with the ecclesiastical. Under the personal direction of the King, affairs of ecclesiastical polity were here in the first place discussed mostly by the Prelates exclusively; but all the secular decrees of the so-called Legislature of this time were framed by Thanes and Prelates in common. The profession of the Church forms herein a counterpoise to the preponderating influence of property. In the decrees of the National Assembly this co-

operation of the clergy is as perceptible in its leaning towards the side of humanity, as the governing power of the kingship is seen in its defence of the liberty of the subject. This periodical personal meeting of the King with Prelates and Thanes kept alive the idea of a final unity of civil and ecclesiastical authority in human affairs. The two powers strove, by harmonious co-operation, to realize the higher calling of the State. The ever-renewed and ever-enlarged protection which the royal power bestowed to the Church was requited by the clergy by repeated admonitions to respect and obedience to the sacred and inviolable person of the King, "the hallowed lieutenant of Christ," as he is called in a Saxon homily, the "*Christus Domini*," as an ecclesiastical assembly at Cealchyth, in 785, styles him. In conformity with this the secular laws regard the King as Christ's representative, "*Cristes gespelia*" (Athl. viii. 2, 42), as the "*vicarius Summi Regis*" (Edw. Conf. 17). Even Ine of Wessex calls himself "mid Godes gife West Seaxena Cyning" (Ine pr.). On the other hand, kings, whose aim was the civilization of their people, the introduction of science and art, the peace of the realm, and improvements in the administration, were obliged to foster the Church and obey her judgment and her counsel, as was done by Ælfred and Charlemagne.\*

The Anglo-Saxon Church was certainly not a perfect expression of the doctrines of the Holy Scripture, but a form of Christianity, with a strong admixture of superstition and formalism. Of course the worship of saints and relics, submission and liberality towards the clergy, due observance of imposed penances and fasts, were her chief doctrines, and for these ignorance, superstition, and an evil conscience afforded more scope than for any other doctrine. But the Church existed, and existed as a great moral power, in a period in

\* The number of the clergy, especially of the inferior orders, and of the monks was very great. The peaceful inclinations of the Anglo-Saxon population, after they had become firmly settled, and had devoted themselves to the industrious cultivation of the soil, the disappearance of the adventurous spirit of enterprise, and of the prospect of booty, the increasing influence and rich possessions of the Church, attracted the lower classes in almost incredible yet well-authenticated numbers to her service. The Venerable Bæda himself allows that by the immoderate squandering of State property the defence of the country was endangered, and the King rendered incapable of re-

warding his brave warriors according to their merits. With regard to the position of the clergy (cf. below, Cap. VI.), the amount of the Weregelt was, according to the law of the northerners, fixed expressly at two thousand thrymsas, the same as that of the civil Thane (App. vii. 2, sec. 5), that of the Bishop and Archbishop at eight thousand and fifteen thousand thrymsas (App. vii. 2, sec. 2, 3). As regards the marriage of clergy, we find even that of Bishop Wilfrid (Kemble, ii. 383). As against the danger of the abuse and the alienation of the Church, the picture given by Kemble (ii. 325) will apply also to this period.

which physical strength and possession of property were almost the only recognized forces. She contained within her that kind of Christianity of which the times were capable; just as the secular State embodied that idea of liberty which the times could understand. This Christianity, beyond all dispute, had blended together the Saxons, Angles, and Jutes of the sixth century, and welded them into one peace-loving and law-abiding people, had humanized their manners, encouraged habits of industry, stamped upon all the institutions of the community a milder and kindlier character, had elevated the intellect, and produced in men like Bæda and Alcuin geniuses of the first order, such as can only arise from similar surroundings.

When, then, for two long epochs the kingdom was inundated by hordes of northern pirates, when the newly consolidated kingdom, labouring under unspeakable distress and disorder, seemed likely to succumb once more to the fate attending the migration of nations, then for a second time the Church accomplished a great work of conversion, which, effecting a marvellous change, brought the barbarian hordes of pirates into peaceable relations with the land and the people, and effected, with surprising rapidity, the blending of the two nations into one.

This position of the Church and her popular internal organization determined likewise the relation of the Anglo-Saxon Church to the papal chair. The national exclusiveness which is shown in the retention of the mother tongue in the Liturgy and the Prayers, prevented the Pope from obtaining any considerable influence. The zealous endeavours of Wilfrid brought about, indeed, a conformity in some important doctrines, but no enduring influence of the Curia upon the English Church government. It was only in the times of Archbishops Dunstan and Odo that a Romanizing tendency sprang up, in the face of the resistance of the majority of the clergy, a tendency that conceded to the head of the Roman Church a supreme authority, and in certain cases put it into actual practice. This tendency was, in the last century of this period, the prevailing one; but more in aims than in results. When the great number of Anglo-Saxon statutes is considered, the close of the period can point to only a very small influence exercised by the Papal Decretals. The Anglo-Saxon ecclesiastical law remained a national one in a fuller measure than in any other country of Europe.

NOTE TO CHAPTER V.—The relation to the papal chair had been for a long time but little more than one of piety, combined with a respectful remem-

brance of the missionary labours of Gregory the Great and St. Augustine. The British Church, on the other hand, which had been spread from the north

by the Scotch missionaries, did not recognize the supremacy of the Bishop of Rome, and the binding power of councils, which he alone had convoked; and she had also other notions as to the time of the Easter Festival, the priestly solemnization of matrimony, etc. The work and influence of this Church within the Heptarchy were quite as significant as those of the Roman Church. It was only at the end of the eighth century that Wilfrid, with all the spirit and energy of his character, first represented the Roman primate in the Anglo-Saxon Church, and in some matters, such as in the celebration of the Easter Festival, gained a notable victory. The Anglo-Saxon Church has to thank the restless struggles of this man, carried on often by objectionable means, for its adhesion to the religious system of Europe, with all its weighty consequences. As early as the ninth century a continental writer calls the English "*maxime familiares apostolicæ sedis*," and the Anglo-Saxons became the most active and successful of Roman missionaries. But this relation ever remained merely an authority at a considerable distance, and one which contented itself with the functions of arbiter on special occasions, when the opinion of the Apostolic chair was sought in consequence of internal dissensions. The best proofs of this are the laments which from time to time the clerical profession emits, that no Church was in a worse state of bondage than the English (*vide* Kemble, ii. 324).

A new epoch commences with the invasions of the Danes. Once again the irreconcilable hatred of the vagrant warriors directed itself against the peaceable settlements of the Anglo-Saxons, and with especial fury against the rich seats of the "lazy" monks, who were held in contempt by the warriors. But as the most evil days have produced the best Christians, the Church

raised itself triumphant from unutterable ruin to the work of converting the Danes, who, after they had accepted Christianity, entered into relations of loyalty and fellowship with the Anglo-Saxon population. With their conversion not only did the selfish, faithless spirit of the old worshippers of Odin appear to be overcome, but from the midst of the Danes themselves went forth the most zealous priests and the highest prelates of the Anglo-Saxon Church. In this period it is Dunstan who, with his well-known strivings after the elevation of spiritual power, represents subjection to the papal see. With the Danish element a new spirit was also brought into ecclesiastical controversies, and with characteristic energy the descendants of the old Vikings threw themselves into the disputes concerning the new faith. The spirit of asceticism in the progressive portion of the Church is an expression of the deep dissension in the national spirit, which had its origin in the invasion of the Danes, and in the growing contrast between poverty and wealth. It is certainly by no mere chance that, two centuries after Wilfrid, not only a portion of the clergy, but the secular magnates also, strove eagerly for the unity and power of the Church under the papal primate, for the celibacy of the clergy, and for the deliverance of the ministers of the Church from the bonds of secularism, and that these aims for many years showed a party tendency. The wretched condition of things which showed itself shortly afterwards under Æthelred II. proves to the unbiassed judgment that in Church as well as in State, licentiousness, rudeness, and sensuality called aloud for energetic interference. The hierarchical tendency in this period advanced a step further. But the formal adherence to the Curial system was first brought about by the Norman conquest.

## CHAPTER VI.

**The Anglo-Saxon Class-relations, and the National Assemblies.**

THE mutual relationship between property and the performance of duties to the State, which has its origin in the duties we have described, forms the first basis of the English class-relations. The military, legal, and police systems, and even the Church, are so dependent upon the performance of duties attached to property, that, so far as regards the immediate claims of the community, the landless man is as good as non-existent; and the small one-hide property is only capable of satisfying those claims in an incomplete and scanty manner. With the development of private property, the number of subjects capable of performance of duty to the State decreases; the majority of the free-born subjects appear only capable of performing such duty in the service of the propertied classes, and in this sense lose their position of national independence. The whole nature of landed property contains a progressive tendency towards dependence, which continually strives after a legal recognition. I proceed to show how in the Anglo-Saxon period the power given by possession and the legal title, arising by the performance of State services, operate in the formation of classes.

1. The dependence of the landless classes upon property is recognized by King and National Assembly; the kind of family relations which have hitherto subsisted become State relations. Attachment and fealty to the lord is seen to be a duty that can be enforced. To defend the lord becomes a recognized right and the duty of the vassal; treason on his part against his lord becomes, like treason against the King, an inexcusable offence. The oath of allegiance taken to the lord is worded like that taken to the King:—" *Sicut homo debet esse fidelis domino suo, sine omni controversia et seditione, in manifesto, in occulto, in amando quod amabit, nolendo quod nolet.*" Personal service is considered a lasting necessity.

When a man has been slain, his lord receives the penalty as a legal compensation, as the King does where independent persons have been killed. The man stands under the special "peace" of his lord. And any person, too, who has a claim against the man, must appeal in the first place to the lord, and afterwards to the King's court. For this the lord must admonish his man to fulfil his legal obligations towards third parties as well as towards the State, though how far this responsibility for, and quasi-representation of, the man went, in respect of reparation for wrong committed, and of penalties, cannot be quite clearly ascertained from the passages in the statutes. These principles are primarily mentioned as applicable only to the personal followers, but it appears to be understood that they were equally applicable to settlers upon the soil, "*cosaeten*," "*geburen*," and tenants upon mesne-land (amongst whom there might be even slaves). The power of arrest residing with the lord, was certainly extended over all dwellers upon the soil of the landlord, whether they were personal servants, tenants, or their belongings.\*

2. The higher duties in the military and legal systems led to the legal recognition of a higher class, to the notion of Thaneship, the Anglo-Saxon gentry, and to further gradations. Even before the time of Ælfred, the retinue which the King and the magnates employed in the service of war, and appointed to the royal military offices, are distinguished in the ranks of the *Ceorls*, as a more honoured class. Whether the Thane was a landed proprietor, or only a grantee of folk-land, or land held of a superior, or whether he obtained his subsistence only in the royal household, military honour and the expensive service of the heavy-armed soldier caused the whole class of Thanes to stand higher in the social scale than the possessors of one hide, and the landless man. The higher character of the services performed appears now as a sufficient reason for the higher legal status of the man in the scale of punishment, in giving credible evidence, and in participation in legal proceedings. The immediate standard for estimating a man's worth is the *weregeld*, which has been fixed in a proportion of two hundred shillings to twelve hundred; that is, it places the Thane six times as high as the ordinary free man. Among the North Angles the scale is as 266 *thrymsas* (= 200 shillings) to 2000 *thrymsas*. The last-named sum

\* As to the recognition of a legal condition of dependence of the serving classes, and those who were settled upon granted land, compare especially K. Maurer, "*Krit. Zeitschrift*," ii. pp. 381-365. The purely personal oaths of the Saxon period (for the Formula

of which see Schmid, App. p. 405) have incorrectly been brought into connection with the later feudal system. Those relations of dependence are still regarded as personal, and may be compared with the modern regulations for menial servants.

is doubled for the geréfa, and doubled again for the Ealdorman or the Bishop.

But since under Ælfred and his successors every estate of five hides is reckoned in the militia system as one heavy-armed man, the rank of a Thane becomes the right (as such) of the possessor of five hides; and the dignity of Thane is an accumulation of rank and possession, service and office, like the later title of the *Barones*. Where two degrees of the higher rank occur, as a twelve hundred man (thane) and six hundred man (gesithcundman), the former may denote the man bound to military service with an estate of five hides, the latter the warrior without such free possessions. The fine or compensation which the King, or the lord of a murdered man receives, is graduated in a similar manner (thirty, eighty, or an hundred and twenty shillings). In the same manner was calculated the protection of the house-right where the peace of the township has been infringed (five, fifteen, or thirty shillings, and in the case of a bishop sixty, and archbishop ninety shillings). Analogous again are the fines for violating chastity and the *mundium* of widows. The whole legal system of this period primarily rests upon the legal protection which is afforded by fines, the higher rate of compensation being invariably a recognition of a higher class privilege. Where landed property has become a condition precedent to performance of service to the State, a larger property becomes a title to a higher position in the community. And where a higher standard for the normal performance has been fixed, the smaller freeborn man, on the other hand, no longer appears as a "full man." The majority of the freeborn sink down to incomplete subjects in respect of the community—to a lower class. The primitive origin of this maxim in the practice of the national courts proves that we are here concerned with legal conceptions.\*\*

\*\* The gradations of classes according to the weregeld, the application of similar gradations to the whole system of penalties and to the value of the corroborating oath, is common to Anglo-Saxon law and to the national laws on the continent. But the wide and early inequality in property is seen among the Anglo-Saxons in the great distance between the classes (two hundred to twelve hundred shillings, for instance); whilst on the continent the contrasts are proportionately less. The normal standard of two hundred shillings for the *ceorl* (as equivalent to the *tywynde man*) is found at first in Alfred, x. 18, secs. 1, 2, 29, 39, 40, and later as a tolerably uniform standard. There has

been much dispute as to the position of the "syxhynde man," who in Wessex occupies a middle place between the "twelfhyndeman" and the "ceorl," and appears also later to be identical with the "gesithcundman." Apparently this intermediate grade did not maintain itself long. (See Schmid, *Gloss. v. Gesith* and *Thegn*: Maurer, *Krit. Zeitschrift*, ii. 60, 62, 396, 510; Lappenberg, i. 569-573.) In conclusion I may generally refer to the well-known maxims of the German popular laws, and to the digest of them in Lappenberg, i. p. 601 *et seq.*: Schmid, *Glossarium*; and K. Maurer, *Ueber das Wesen des ältesten deutschen Adels* (Munich, 1846), pp. 123-198.

8. From the co-operation of both these conditions the notion of territorial lordships is developed. The master and landlord was in possession of the actual power to dismiss his *gesith*, and deprive his tenants of the land they held from him. From this position of authority follows *de facto* the right of the lord to decide disputes among his *gesith* and tenants. An appeal to the King's court against the will of the lord, would have immediately jeopardized the economic position of the "man." But the claims of third parties also were first to be brought before the lord; in fact, they were generally settled through his mediation. That portion of the fine (*wite*) which is paid by independent persons to the royal sheriff, falls in this case to the lord, as an analogous recognition of his rights as a mediator. When thereupon the extended responsibility of the lord for all the settlers on his soil became added, police duties brought with them corresponding police rights, and responsibility for his "man" (for which again the lord himself was allowed to demand security) led to a right of arrest and other preventive measures. Through the recognition of the State, there arose out of a domestic "*imperium*," a "*jurisdictio*," which was the real and effectual court of law for the dependants. As the power of these magnates increased, further royal privileges passed gradually to the territorial lordships; and from the time of Cnut even an inferior criminal jurisdiction. Where within such close lordships free allodial peasants were still found scattered as settlers, there was at last practically no other way of subjecting them also to the lord's court, than by royal grant. (Cod. Dipl. No. 902.) Now when we consider that the greatest landlords possessed, in the person of their armed followers, effectual means for the maintenance of the peace in their immediate neighbourhood, and that their powers as landlords and masters and their legal and police jurisdiction became more interwoven in each succeeding generation, there were present here the germs of a system of small states, analogous to those on the continent. The great lordships with their numerous magistrates now ranked alongside the Hundreds. Nominally, indeed, the county jurisdiction includes in itself all these lordships, but in the face of a compact "*saca et soca*" the interference of the Shir-gerêfa was now merely an exception, and a royal reservation.\*\*\*

\*\*\* As to the importance of the Anglo-Saxon landlordism, see the essay of Zöpfl, "Alterthümer des deutschen Reiches und Rechts," vol. i. No. v. pp. 170-211, in which, however, the analogies drawn with the state of affairs on the continent are to be used

with caution. (See further the well-grounded treatise of K. Maurer, ii. pp. 49 56; Lappenberg, i. 572; Schmid, Gloss. v. socm.) The blending of those economic and legal conditions was so unavoidable that even the powerful personal influence of Cnut could not



Through the effect of this legislation the classes which have been formed by the varying scale of property appear now also in a legal gradation of ranks, which afford numerous parallels to the class-formations of the continent.\*\*\*\*

In the first class are the great Thanes, *i.e.* the owners of great lordships, and with armed followers. We gather from the records, as also from the nature of the case, that their number was small, and may be compared with that of the later "*barones majores*." They are, as a rule, distinguishable by the exercise of a separate jurisdiction "*saca et soca*" to the extent of a Hundred Court. According to a passage in the *Chronicum Eliense*, an estate of about forty hides was in those days regarded as the minimum of landed property for such a great Thane. They fill the high offices of State, and the secular dignities of Ealdormen, and appear as the actual leaders of armed retinues. But the incompleteness of this class privilege is demonstrated by the fact that in regard to their Weregeld they are twelf-hyndemen, like the smaller Thanes, and only have a higher Were in their capacity as Ealdormen, or by virtue of some special official dignity. On a par with them stand in the ecclesiastical hierarchy the Bishops and certain great abbots, but the Bishops, raised both by dignity and property, stand on a higher grade of Were than the other Thanes. (1)

A middle rank (to a certain extent the "middle class" of the period) is formed by the thousands of "county Thanes," possessors of more than five hides of land and of martial retinues (twelf-hyndemen and six-hyndemen). The first

change anything therein, and 'it is since Cnut's time that the royal rights of sovereignty appear mere reservations in reference to the lordships. (Cn. i. cap. 12.)

\*\*\*\* On the Anglo-Saxon class distinctions, which result from this combination, there is a comprehensive monograph by Saml. Heywood, "Dissertation upon the Distinction in Society and Ranks of the People under the Anglo-Saxon Government," (London, 1818, 8vo); cf. Hallam, "Middle Ages," app. iii.; K. Maurer, "Ueber das Wesen des ältesten deutschen Adels" (Munich, 1846), pp. 123-196; and "Krit. Zeitschr." ii. 415, 31; ii. 30-68, 388, *et seq.*; Kemble, "Anglo-Saxons," c. 7; Stubbs, "Const. History," i. c. 8.

(1) The position of the secular great Thanes in the civil gradation of the Weregeld and the legal compensation is not different from that of the

class beneath them. In like manner their lordship (*saca et soca*) over a greater district, so far as the constitution of the tribunals is concerned, is (if certain grants be excepted) not different from the *saca et soca* of an ordinary Thane over a single estate. The inheritance of an Ealdorman's dignity is (with perhaps the exception of the county of Cheshire) only an actual and not a legally recognized institution. Even at the close of this Anglo-Saxon period, in the family of the Majordomus Godwine there is as yet no inheritable dignity to be discovered. The troublous times that followed, especially the Danish struggles, were in this particular also favourable to the aristocratic element. The reason why the Danish period leaves behind it in the constitution so few traces, is that it brought about only a partial alteration in the persons of the Thanes, and a local colonization.

named, as Witan, constitute the regular County Assembly, and, where they are numerous enough, the Hundred Court also.

The appointment of Thanes to royal offices is, moreover, so much a matter of course, that the term Thane is used promiscuously to denote a royal officer, royal warrior, and a greater landowner. Outside the ecclesiastical hierarchy the ordained priests are included in this class as "Mass-thanes," whose Weregeld was, however, in later times, variously determined according to their birth-rank (*Leges Hen. i. c. 68*). (2)

The third class is formed by the smaller landowners, who still form an active element of the Hundred Court. Next to these come, *infra classem*, the landless people, who were in the service of the household, or settled upon a lord's lands and forced by law to put themselves under the "peace-security" of a Thane, or of a tithing-confederacy. They are all *liberi homines*, but only in a technical sense, in contrast to the serfs. They still perform military services, but mostly in the train of greater proprietors; whilst the common military duty of the small proprietors exists chiefly in name and in case of need. From these common characteristics the whole class in the later Anglo-Saxon period is comprehended under

(2) As to the position of the county Thanes, see Schmid (*Glossar.*, pp. 664-668). The apparently unsurmountable difficulties are solved by the later form of the militia, which after Ælfred's days includes (1) the possessors of five hides, as such, (2) the heavy-armed vassals in the service of the King or of a great landowner independently of their own freeholds; and again by the fact that the state and court offices in the household of the King, and of the magnates, are at the same time military offices. Thaneship is accordingly a mixture of the conditions of property, of a military profession, and of an office, for which the general appellation Thane is as suitable an expression as the later word "*Baro*." This denotation of the "Men" embraces to a certain extent the full active citizenship of the times. Hence, and from other sources, the express mention of "Thanes without land of their own" (*Athelstan*, vi. 11; *cf. In. 45, 51*) is readily accounted for, as well as the various mention of *Thanes* without possession or with very small possessions, in the Domesday Book.

The half-developed hereditary quality of Thaneshood is further accounted for, which, so far as it was dependent upon property, was a matter of course, but

so far as it was dependent upon military vassalage was as yet in the beginning of its development. The idea of a ruling class is shown in the fact that the *eorl* no longer becomes at once a Thane from the mere acquisition of five hides, but only "when he has a church and a kitchen, a bellhouse and a seat in the castle gate and a special office (*sunder-note*) in the King's hall" (*Schmid*, app. v. Of secular rank, sec. 2). On the other hand, in the essay upon Weregeld (*cap. ii.*) possession alone seems to be indicated as a condition precedent: "And when a *eorl* comes to have five hides of land for the King's array, and he be *alain*, let him be compensated for two thousand *thrymsas*" (sec. 9). "And if he even comes to have helmet and armour and a sword inlaid with gold, *if he has no land he is still a eorl* (according to *Lambard's* text—"although he has not the land, he is still *sithound*") (sec. 10). These stages of transition and mixed conditions occur also in the development of the lower nobility upon the Continent. An express mention of the fact that Thanes could have other Thanes as "vassals," is to be found in the treatise upon the secular ranks (*Schmid*, app. v. sec. 3; *cf. Edg. ii. 3; Athl. viii. 8; Cn. i. a. e. ii. 32, sec. 1*).

the term *ceorls*. On account of the normal *Weregeld* of two hundred shillings they are called "*twyhyndemen*." And here it is especially characteristic of England that the general dependence of the lower classes upon great landed proprietorships does not, as in France, rest upon the "*seniorat*" (*i.e.* the recognized representation of the small man in the matter of military burdens by the greater landed estates), but upon the police protection of the *Hláford* over all the settlers on his soil. The comparative neglect of the military system had already in those days caused the class distinctions to be determined more by the police than by the military constitution, and gave the aristocracy more the political position of police magistrates than of "*seigneurs*" in the continental sense of the term. (8)

These class-gradations are regulated by quasi-mutual engagements, partly by property and partly by profession. Like property, they too are inheritable by birth, and with each generation approach nearer to the character of birth-ranks. The great offices and prelates' places are not inheritable: but as a matter of fact they are, under ordinary circumstances, regranted to the heir of the great Thane. The lesser *Thanes* appear in still greater numbers as hereditary classes through property and the entrance of their sons into the same relation of service; the sons also have "*Thane-right*" even before they succeed to the paternal possessions. This hereditary division into grades affected most the *ceorls* in their low position, which was becoming by degrees almost despised. In contradistinction to the *ceorls*, the higher and politically influential classes are grouped together as "*eorls*." And already expressions appear signifying hereditability, as "*ceorliscman*," "*ceorlborn*," "*thegenborn*," "*ethelborn*." In considering these class-distinctions two views are met with; the somewhat older of the two regards the ordinary freeman as the normal basis of the State, and the higher class as an increase

(8) The position of the free *ceorl* is now only connected with political rights by the fact that the *ceorl* may perform the duties of a judge in the Hundred Court, where local circumstances permit. In other respects the mass of the *ceorls* have already sunk to the position of passive members of the State. So much the more are the landless men, Welshmen, the freedmen, and the villeins *infra classem*. (See Stubbs, *Const. Hist.*, i. 80.) The whole of the third rank, as regards its political importance, at the close of the period is dying out. But the civil freedom of the *ceorl* at the close of the Saxon period has been frequently and

wrongly denied; Kemble, for instance, falls into the fundamental error of regarding all civil dependence as "*slavery*." The *ceorl* has his *weregeld* in his own right, is capable of bearing arms, of possessing freehold property, and also of rising to a higher rank by the acquisition of a five-hide estate. The later law of settlement certainly binds the mass of the labouring classes *de facto* to the soil, without on that account creating slavery in a legal sense. But it is certainly true that the name of the *ceorl* had a somewhat contemptible secondary signification.

of honour. After Cnut's day, on the other hand, the Thane is looked upon as the *liberalis homo* properly speaking, in contradistinction to whom the ceorl is described as *illiberalis* (Leges Cnuti, iii. 21, 25), without intending thereby to call in question the ceorl's character of freedom as regards civil rights. Compared to the *liberalis homo* the Thane thus again appears as *liberior*. And beyond all dispute in this lies the bright side of the Anglo-Saxon foundations. It was the Church which left it open to all classes to mount up, as their right, to the highest dignities in the land. But in the secular state also the right to rise into the higher ranks was kept open to all. Firstly, in the case of the hereditary servant, by the laws relating to emancipation. In the case of Welshmen by a law enacting that a stranger also should rank as a Thane, if he possessed five hides of land. In the case of the ceorl, by a law that he also gained Thane-right on the acquisition of five hides of land, etc. A merchant was to rank as a Thane if he had thrice crossed the seas. By royal grant of a high office (and the consequent endowment with an estate), the ordinary Thane might rise up to be a King's Thane and an Earl. As at the Carolingian Court, here also court offices were the direct way of putting new families on an equality with older ones; with regard to this the laws say, "let it be an incitement to worthy deeds that through God's grace a slavish villein can become a Thane, and a ceorl an Earl, in the same way that a singing man can become a Priest, and a clerk a Bishop."

The elements of property that have hitherto been described, and their gradations according to legally recognized classes, when taken together, show the possible participation of the people in the collective will, and the political constitution of the Anglo-Saxon state. But this national representation displays, in the following degrees, the same stages of development, by which on the continent the original popular assemblies of the Germani were transformed into the later assemblies of the *optimates*.\*

\* According to the testimony of Tacitus there was among the Germani a time during which the service for the army and duties in the law court were, as an established principle, the same for every freeman, and consequently the deliberation on matters of common interest was participated in by all the freemen under equal conditions. Among the small tribes the great judicial assembly naturally became identical with this deliberation on common matters. But this condition of things must necessarily change,

so soon as a number of small confederations united and formed a larger community, which soon began to occur in consequence of common warlike expeditions and common defence of territory. The great undertakings of the national migrations which were dependent upon joint operations of war on a very large scale, must have been preceded by numerous combinations forming greater confederacies. As a rule these greater unions were based only upon the recognition of a common leader in war and upon a council formed

(1) The oldest form of the popular assembly is a consequence of the fundamental Germanic idea of law and law-courts, according to which the mere ordinances of the magistrate could not alter the customary law established by tradition (i.e. the traditional procedures in civil and criminal law), being as they were rights inherent in every free-born man. This conception and the constitution of the tribunals act and react upon each other; as justice is dealt by free fellow-men, no despotic command from without can compel the judges to swerve from the legal usage. To effect a change in the *lex terræ*, the higher authority of the whole people must be required to induce the judges to accept the new law. In this sphere the German regarded those in authority over him merely as the head of a decreeing assembly.

(2) This original basis of a legislative assembly becomes modified, shortly after the settlement of the tribes, by the influence of property. The regular military service, as well as the practice of judging in the courts, gradually becomes concentrated in the middle and upper classes of landowners. As the result of their usual independent activity in military and legal matters, participation is confined in a narrower circle to the Witan, the *boni, probi, legales homines* as they are termed in the Latin official language, before whom the smaller common freemen recede into the position of mere bystanders. It is the habit of activity in details, which nourishes the interest and establishes a higher right to participate in action for the common good. Shortly after the migration of nations popular assemblies even of smaller tribes appear everywhere to be essentially assemblies of the "*boni homines*," who, under various national appellations, form not the whole, but yet the leading element of the assembly.

(3) With the union of the smaller tribes (*civitates*) into

by the chieftains of the individual tribes for the time being. A blending together of the sub-tribes to form a common legislative assembly was for local reasons as yet impracticable, and presupposed a closer union than was aspired to anywhere. Hence, in the whole range of authentic history we find only a single mention of such a joint parliament among the Saxons on the continent, in which thirty-six deputies (twelve each from Eastphalia, from Engern, and from Westphalia) took part. (Ex Vita S. Lebuini auctore Huobaldo Elnonensi. Pertz, ii. 361.) Among the Anglo-Saxons a republican assembly of delegates of such a description could not originate in the same manner. Their expeditions in search

of conquest were from the first dependent upon a permanent position accorded to the minor chieftains. Hence the early origin of hereditary principalities, which, after endless struggles, submit themselves to greater kings and after Egberht (821) and Eadward the Elder to one king, under whom, however, the special National Assemblies of each of the former separate kingdoms live on for a long time. But it is only after the time of Eadward the Elder that the periodical existence of united parliaments of the *Optimates* is in any measure authenticated. The analogies applicable here are found rather in the monarchy of Charlemagne.

greater confederacies and kingdoms (such as Franks, Goths, etc.), the general popular assemblies altogether cease. Assemblies of such a description would for geographical and economical reasons, owing to the mode of communication and travelling in those days, have been utterly impracticable, and, as a fact, never did exist. The representation of the collective people by the "*boni homines*" was accordingly limited to a narrower circle of "*meliores seu optimates terræ*," who included the most eminent members of the army, the Law Courts and the Church.

(4) Hand in hand with the ever increasing power of property, the hereditary family kingship comes into being, as the head of the *concilium optimatum* described above. But to the kingship falls not only the right of fixing the place and time of the Assembly, but also that of its inseparable incident, the personal summons of the *meliores terræ*. In this, due regard was paid both to ancestral dignity and also to the objects of deliberation on military, legal, and ecclesiastical affairs, for which their ready co-operation was essential. The popular Assembly has now become the "*Consilium Regis*," the King, the "*arbiter*" as to the persons to be summoned; in which functions the influence of those who were customarily summoned, and the effectual result of the deliberation, materially limited the exercise of choice. It certainly was understood that beyond the circle of those specially summoned, persons residing in the neighbourhood, and when the militia was called out, those summoned to compose it, and in coronation and court festivities a still larger circle, should participate, not as equally privileged members of the *consilium*, but merely as "bystanders." Only when the continuous line of the family kingship was broken, or when the kingship showed itself incapable, or fell into dissension owing to usurpation, a right of wider circles to join in deliberation revived as a reserved right of the collective people.

Such was also the course of the Anglo-Saxon folk-motes; after the union into larger kingdoms the National Assemblies (*concilia*) are gathered round the person of the King. In the smallest kingdoms, as in Kent, the ordinary Law Court Assemblies remained identical with the popular Assembly. In the larger kingdoms, the National Assembly could only include a narrower circle of "*meliores terræ*." In a still greater measure was this the case after the union of the so-called Heptarchy. It was then the King's right not merely to fix the place, but to personally summon the "*optimates terræ*," according to the purpose of their deliberation, touching common war operations, common institutions or changes in the military and legal system, or in the Church. Common regulations as to

the militia and operations of war were necessarily deliberated upon with the leaders. The leadership which was acquired by ownership of land is now lodged in the great Thanes, who with their numerous armed retinues form the active army. The legal leadership is based on the office of the Ealdorman appointed by the King from among the great Thanes. From this point of view the Ealdormen and the other great Thanes were to be summoned to attend the National Assembly, as well as those Thanes who had been appointed to command in consequence of their military experience.

Common alterations and changes in the *lex terræ* and the legal system were necessarily discussed with those who habitually presided in the tribunals. These are again, the Ealdormen appointed by the King, and with them the Shir-gérêfas; the great Thanes also, apart from these offices, as having special courts of their own over their own people. Since the diminished influence of the military element the legal system mainly influenced the constitution, and the term "Witan" (*Juristor, Rechtskundige*) from this point of view is regularly used to denote the members of the National Assembly.

Upon ecclesiastical affairs those were necessarily consulted whose province is doctrine and the cure of souls. These were the Bishops appointed by the King, and when great monasteries sprang up, certain abbots with them. The great landed property of the Prelates put them upon an equality with the great Thanes, and, coupled with their ecclesiastical dignity, gave them the first place. From the nature of its organization the Church is less connected with the individual county assemblies than with the central national assemblies, where the ecclesiastical influence becomes concentrated, and the spiritual and temporal estates are bound together. The hand of the clergy is distinctly visible in the numerous decrees for moderating class-privileges. Ecclesiastical matters are discussed in the first instance, and as a rule exclusively, by the prelates.\*\*

\*\* Particulars as to 147 Witenagemôtes from the year 698 to 1066 are given by Kemble, vol. i. pp. 207-230. The name Witenagemôte is a conventional one. In the records they were styled, like all the Saxon Law Court Assemblies, gemôtes, "*Commune consilium, curia magna, assisa generalis, placitum universi populi, placitum omnium liberorum et hominum*," etc. The subjects for deliberation included, as we see from the extant Anglo-Saxon laws, decrees as to war and peace, and resolutions as to the legal system, but

especially as to the maintenance of the peace, and police regulations. In addition to these, we have the separate group of ecclesiastical affairs. The recorded decrees of course form only the portion which appeared to be of permanent importance. The current business included settlement of disputes between powerful Thanes and prelates, and popular grievances of all sorts, especially complaints of the denial of justice. The Witenagemôte is not so much a Court of Appeal as a supplementary resource for those

These premises are corroborated by all the accounts touching Anglo-Saxon national assemblies, which after the time of Eadward the Elder appear in great numbers. The Witenagemôtes are formed out of the prominent elements in army, court, and Church. They meet from time to time, to settle the disputes between the various elements in the community, and to discuss and enact in common the most important measures for the present and the future. The summoning of the members takes place by royal writ. But as an acknowledged capital did not exist for the customary place of assembly, the King determines such place of meeting, varying his choice extensively, according to time and circumstances—which necessitate a call by express summons. As property is a condition of all the chief positions in the Commonwealth (with this difference, that in the secular constitution property leads to office, and in the ecclesiastical constitution office to property), a representation of property is also inherent in the Assembly; but not of bare possession, but of property according to the duties it performed to the State; of property in proportion as it effectually fulfils civil functions. And therefore it is that we find no trace of elected members; for neither in the army, the tribunals, nor the Church is the principle of election, in the modern sense, applied. No trace occurs of a special representation of the cities, since they have no independent existence, either for the tribunals, the army, or the Church, but are absorbed in the county. No trace is visible of the representation of manors as such; for the great Thanes actually form for the purpose of the militia their own divisions, and in the legal system their own manorial courts; but military and legal duties are still legally incumbent upon the individual under Thanes. Hence we find also no trace of a recognized hereditary nobility, neither a higher one for the great Thanes, nor a lower one for the other Thanes; but an actual inheritance of property and influence, which both actually and in the common perception must begin to appear like a "birth rank." \*\*\*

who were unable to obtain justice in the county. The enacting character of the Assembly is expressed in the style:—"*(Ina) per commune concilium et assensum omnium episcoporum et principum, comitum, et omnium sapientum et populorum totius regni;*" "*Edgardus rex consilio sapientum;*" "*sapientes consilio regis Athelstani instituerunt;*" "*Rex Edmundus et episcopi sui cum sapientibus constituerunt.*" Its consent is expressly mentioned in the conclusion of contracts, summoning the army, in ecclesiastical ordinances,

but most frequently in the allodification of Folkland.

\*\*\* As to the component parts of the Witenagemôte, the signatures of the decrees which have been preserved to us, give authentic information. They begin generally with the names of the royal family and the bishops; then follow those of some *principes, duces*, and court officials, i.e. Ealdormen, and other great Thanes. Then those of "*milites*," i.e. Thanes, thirty, forty, or more in number, who have received a writ of summons. The greatest number



The indefiniteness of these conditions and the intermingling of later institutions has attached various fictions to the Saxon Witenagemôte. Sometimes it is described as a House of Lords, sometimes as a House of Commons, and at any rate as a legislative and tax-granting assembly. As a matter of fact, it was neither of the first two, nor was it, again, in the later sense of the term, a tax-granting body; it was rather a *Consilium Regis*, formed out of the leading elements in the army, in the law court, and in the Church, a representation, so to speak, of the masses of property according as they actually fulfil their political functions. But the decided ascendancy of the great Thanes in these assemblies is unmistakable, and this ascendancy compels the weaker kings to fill the great offices according to their advice, and to enact the most important measures according to their counsel. This appears the more distinctly, as with the decay of the common military array, the armed force becomes concentrated in the great Thanes and their skilled soldiery. The counterpoise which the ecclesiastical constitution at first afforded, afterwards loses its power. Especially after the conversion of the Danes to Christianity, the prelates' sees pass even more completely to members of the same distinguished families, which on the secular side of the State dominate as great Thanes. Persons and tendencies became on both sides more homogeneous. In the aimless confusion of the political system under Æthelred, this aristocratic character of the constitution becomes established; under Cnut it is an accomplished fact; under Eadward the Confessor the highest dignity in the realm is but a shadow kingship.

of signatures that has been hitherto discovered amounts to one hundred and six; frequently we meet with numbers between ninety and a hundred; and more frequently smaller numbers occur down to twenty and less; in connection with which we must particularly observe that very often special assemblies were holden for the ancient divisions of the kingdom. As in the case of the county assemblies there were also bystanders. The "men" of the county were nearly always present, and still more regularly the magnates brought with them a numerous train of Thanes, priests, and others. The ascendancy of the Bishops and the great Thanes silenced the voice of the freemen and the retinue. Only where a new King was to be acknowledged,

was the acclamation or dissatisfaction of the bystanders regarded as of any moment, and this was a reminiscence of old times. An elective principle exists only among the subordinate spheres. In all the important offices, on the one side the needs of army, law courts, and Church, for an extensive political system, have established the principle of royal appointments, and on the other side the social law prevails, which modifies the overweening power of property by royal appointment, without which the offices, as on the continent, would have been appropriated to themselves by the magnates on account of their property. The judgment of Palgrave (vol. i. 118) is historically correct.

## CHAPTER VII.

*The Decay and Fall of the Anglo-Saxon Kingdom.*

STATE and Church should knit together what society separates. The vital strength of a political system is therefore to be measured according to the antipathies which it has been able to surmount. These were in England less antagonistic than those which the dangerous soil of the Roman provinces presented to the Germanic settlers: yet the Saxons, Angles, and Jutes, had also to struggle on the British Isle with considerable national, social, and ecclesiastical discordances, over which at last they were unable to gain the mastery.

I. As a national antipathy that of the Keltic-British element was first to be overcome. The barbarous warfare of the early centuries had partially annihilated the Romanized Britons, partially ousted and driven them back, but to some extent had also incorporated them. The haughty conquerors now called them "the strangers," "wælen." The formation of the English language, in which many words relating to domestic life and the occupations of women are of British origin, proves that the Saxon settlers also took to themselves native women for wives, without giving up their own stronger tribal peculiarities; a certain number of the Britons were also kept as servants. Where the Germanic settlements were only partially able to people the district, even British landowners remained in possession of their peasant farms, or at least retained a holding on granted land. The incorporation of British provinces in the Christian times was brought about generally under better conditions. Later times recognized even a higher class-privilege in the case of "wælen" possessing five hides of land. Christianity, and a life led side by side for centuries, triumphed over national animosity. A consequence of this intermingling, however, was that in the great province of Mercia, the Germanic nationality could not form its political system with the same uniformity and durability as elsewhere.

A further antipathy arose from the tribal diversities existing among the Germanic settlers themselves. Angles, Saxons,

and Jutes originally hardly differed in their language, their law, and their customs. But the contrasts became somewhat more sharply defined, after the individual chieftains with their followers and soldiery had formed small states upon their own possessions. For more than two centuries the so-called Heptarchy displays a picture of a struggle full of vicissitudes, in which the chronicles mention not less than a hundred battles and campaigns; in consequence of which the more peaceable small states became subject to the three larger and more warlike ones. It was highly important in this crisis that as early as the end of the seventh century, the larger portion of the Anglo-Saxon Church should have become united under Archbishop Theodore. After the ecclesiastical unity had worked powerfully for a century and a half, and prepared the way for political unity, the country, at all events as far as the Humber, is united under the supreme sovereignty of Ecgberht (827). The common calamity of the Danish wars, and the common deliverance by Ælfred, completed the internal blending of the peoples. The brilliant reign of Æthelstan shows us the old tribal diversities truly removed: the differences of the Heptarchy have ceased to exist. After Eadward the Elder, the union of the formerly separate National Assemblies has been successfully achieved.

But meanwhile a new antipathy had arisen through the invasions of the Danish and Norwegian pirates, who, with ever larger armies, succeeded, after endless ravagings, in becoming masters of the country about the year 878. The southern portion of the kingdom, it is true, rouses itself under Ælfred to victorious struggles. But the hard-won peace between Ælfred and Guthrun leads only to a division of the kingdom, in which Norfolk, Suffolk, Cambridge, Ely, a part of Bedford, and great districts in Mercia subject to Wessex, were given over to the Danes. A relatively small number of the foreign warriors sought to establish themselves here in the military settlement of the "five Danish burgs," Lincoln, Nottingham, Derby, Leicester, and Stamford, with which were at times reckoned York and Chester. In other districts the more scattered invaders took possession wherever possible of the greater estates. As usual, the proprietary class was especially affected by the conquest. Still on the whole this first stratum of Danish settlement showed itself so unstable, that before the death of Eadgar the dynasty of the Cerdics had again become lords of the Danish provinces. The influence of peaceful settlement, marriage, and above all, the unceasing labours of the Church in this the prime of the Anglo-Saxon kingdom, effected, except in a few places, an assimilation of the Danish element. The independent confederation of the

Danish cities was again dissolved after the subjection of Leicester and York (918). But under Æthelred the Unready there was a second period of invasion by Danes, who were superior both in importance and civilization to the rude hordes of the earlier epoch. The result of varying engagements leads (1016) to a division of the kingdom between Eadmund Ironside and Cnut, in which the northern portion of the country is abandoned to the Danes. After the murder of Eadmund the southern portion also submits to the powerful Danish king, not indeed as to a conqueror, but as to "one chosen" by the Witan to be head of the whole kingdom. The quarter of a century of this Danish dynasty certainly left behind it weighty consequences. Though the total number of the northern invaders did not perhaps amount to one-tenth of the whole population of the country, yet a deeply rooted dis-union had arisen in the leading class, a dis-union which was all the more fatal in its consequences, as Cnut knew no other means of consolidating his rule, than by murdering, banishing, and supplanting the popular old families. The great assembly of the Witan of the kingdom exhibits from that time forward a curious mixture of Danish great Thanes with Saxon Lords and Prelates, whose respective ideas and interests, although not described by the laconic historians of the times, can be gathered from the events of the period. This internal disunion divided the old mother country of the dynasty of Wessex less than the rest; but the great territory of Mercia, owing to its always mixed population, and to the Anglo-Danish Thaneship, became a region upon which no reliance was to be placed in times of serious danger. Things were worst in the northern districts, in which there was an almost undistinguishable blending of tribes which might easily lead ambitious governors to declare themselves independent. Under Eadward the Confessor the prominent Danish element, coupled with the opposition against the hierarchical tendency of the Church, appears in the family of Earl Godwine, which, being in possession of the great governorships, had now reduced the kingship to a mere shadow of sovereignty.<sup>(1)</sup> The antipathy of the nationalities,

(1) The antipathy of the nationalities is primarily dependent upon the continuance of the British-Keltic national element (Lapenberg, i. 122, *et seq.*, 104 *seq.*). A statistical proof of the strength of the Keltic element is nowhere to be found. In the language, in which Whitaker considers that there are still three thousand words of British origin, it is evident that the numerous Gaelic words relating to

domestic life and small domestic occupations, point to marriage with British women, or to British domestic servants. In general it was the western counties, towards the borders of Wales, which showed an intermixture with the Keltic element. It is especially prominent in the counties of Dorset, Somerset, Wilts, and Devon, which Ælfred the Great was the first to incorporate, and also in Cumberland. The tribal diversities

however, became alike injurious to both dynasty and kingdom, when it coincided with another disintegrating force.

II. This was the social contrast of the propertied classes, which for centuries had been undermining the Anglo-Saxon commonwealth in its very foundations. In many districts the first settlement had laid the foundation of a free peasantry in a comparatively weak manner. The customary forms of the military and judicial system, under the feuds of the Heptarchy had, in almost equal degrees, contributed to the degradation of the smaller landowners. Egberht's kingdom was already in great districts entirely portioned out into estates and manorial possessions. The great misery which both epochs of the Danish invasion spread over the country brought about the almost universal ruin of the small freeholds which then existed, the result of which was seen in Cnut's laws and manorial grants. The strength of the freedom of the common people, the self-respect and the martial excellence of the

of the Angles, Saxons, and Jutes, are exhaustively treated by Lappenberg, i. 85-103. In the Anglo-Saxon statutes, the traces of it are hardly discernible. The tribal contrast in the kingdom of the Anglo-Saxons and Danes appears of no great importance in the treaty between Eadward and Guthrun (Edw. et G. 3, 6-9). In Cnut's day a different fine is mentioned for the "*trinoda necessitas*," Cn. ii. 65; for denial of justice, Cn. ii. 15, sec. i.; for *Hlmasdon*, Cn. ii. 62; differences existed in the royal privileges, Cn. ii. 15; and in the purgation from accusation of treason against the king, Æthlr. xi. 37; for security in the case of thefts, Wilh. i. 3. sec. 3; i. 21, sec. 2. Already in the earlier Danish period Eadgar had secured to the Danes the preservation of their law (Edg. iv. 12, 13). In still greater measure was this the case in the second period; notably in Cnut's reign, in which a Dane law "*Danelage*," as a collective expression for certain special legal maxims (Provincial law) is distinguished from the "*West Saxonelage*," and from the "*Merchenalage*." That these were not thoroughly different systems of the whole Civil Law is proved by statements as to the real meaning of these differences. A further tribal affinity between the invaders from the Scandinavian lands and the Angles and Jutes of the first settlement, existed from the very first. In later times this question has become the subject of a party controversy, in which an attempt

was made to prove that the Germanic foundation of England was not attributable to the Angles and Saxons (i.e. the former inhabitants of Schleswig-Holstein), but to the Danes and Denmark (E. I. H. Worsaae "An account of the Danes and Norwegians in England," 1852). The Norsemen who from the eighth to the eleventh century disquieted Europe are hordes of the great Teutonic family, who, coming from Norway, Denmark, and Sweden, infested the continent. The Anglo-Saxon population called them "*Danes*," from the nearest coast from which they sailed, without inquiring concerning the more distant lands from which they started. Were all the formations of words and syllables, which in proper names and names of places are quite as much "*Anglish*" as "*Danish*," to be taken as evidence of Danish origin, quite half of England could be described as Danish, and the Anglo-Saxon element represented as the declining and subordinate one. (Cf. *contra*: Donaldson, "English Ethnography," Cambridge Essays, 1856.) The Danish element certainly preponderated in Norfolk and Suffolk, and along the coast line between the Humber and the Forth; it may divide the north and north-west fairly equally with the Anglo-Saxon. The computation which gives the number of the Norsemen who stayed in the country at two hundred thousand, is probably rather too high than too low.

Anglo-Saxon Ceorl, diminished from century to century, in spite of the guardian power which the King wielded. Even the prosperous times of the monarchy only delayed but did not prevent this process of dissolution. As yet no civic and industrial life was able to develop itself, to raise the ancient freedom to new strength and new honour upon the foundation of new modes of property. No new principle of military service had been discovered, which should prevent it from exercising a destructive influence upon the smaller landowners.

Thorough reforms, such as the Carlovigian laws attempted, appeared in England less urgent, because its insular position continually induced carelessness. The mild sway of the royal race of Cerdic, under the advice of their spiritual and secular Thanes, was ever averse to violent aggression, and only cared for a well ordered administration, without touching the legal basis of the military system, viz. vassalage and a popular army. Cnut's energetic nature preferred, when in peril, to rely for the support of the royal throne upon a mercenary guild of three thousand Huscarls, which could find no permanence among the popular customs, the conditions of property, and the finances of the time. The militia, however, continued in its wonted groove. Cnut had also found it advisable to conclude a peace with the Church. In like manner he allowed the accumulation of landed property to go on without interruption. Like a meteor, therefore, the phenomenon of the powerful Norse king passed by, without solving any one of the problems of this political government. Still less capable of such a task was the weak rule of the last heir of the old royal house of Wessex. (2) Under the feeble rule of Eadward a third antipathetic force comes into great prominence, the way for which was prepared in the course of the preceding generations.

III. This was the opposition of the ecclesiastical to the royal power. From the earliest times the Church had been the reconciling element among national antipathies; she had

(2) For the social forces opposed to the constitution I must refer my readers to the picture given in cap. iii. of the local land distribution. This was the primary evil which the Anglo-Saxon State, in spite of its numerous excellent supports, could not hope to eradicate (*vide* Kemble, i. 252). William of Malmesbury says of the national assemblies of this time, that as often as the Eorls assembled in council, the one chose this and the other that topic; they were seldom agreed in any good opinion; they deliberated more concerning domestic treason than concern-

ing public needs. The same picture is drawn by Lappenberg, i. 460; cf. also Stubbs, Const. Hist., i. 211. "The cohesion of the nation was greatest in the lowest ranges. Family, township, hundred, county held together when Ealdorman was struggling with Ealdorman, and the King was left in isolated dignity. Kent, Devonshire, Northumbria had a corporate life which England had not, or which she could not bring to action in the greatest emergencies. The Witenagemôte represented the wisdom, but concentrated neither the power nor the will, of the nation."

helped the triumph over the smaller dynastic states; she had shown herself in the early Danish times once more as the reconciling polity-creating power. But the Church could never have attained to this powerful position, except upon the broad basis of landed property; this property to the extent of about one-third in the kingdom was, in the later Anglo-Saxon times, in her hands. Her higher tasks were thenceforth entangled with interests of property, which in two directions opposed the demands of the State. First of all, the Church was the chief impediment in the way of changes in the military system, which were every day more urgently needed, for she absorbed through her expansion the possessions of the State in the Folkland, and so deprived the sovereign of the means of keeping on foot the requisite number of skilled warriors; this was admitted by Bæda even in his time. The modest share borne by the Church in the decayed militia was not sufficient; there was needed besides for the military requirements of the day a very great increase in the numbers of the Thanes. But the powerful interest of the Church was antagonistic to any fresh distribution of the military burdens; for every firm and more just distribution on the landed property affected first of all the possessions of the clergy, who were little inclined to make sacrifices for such ends, and still less to allow a secularization of Church lands. And yet no permanent military constitution was possible without serious demands upon Church property. It would have required a violent reformer to beat down the opposition the spiritual Witan would make to such changes; in short, the monarchy in this critical century lacked its Pepin or Charles Martel.—In another direction, the Church assisted still further the expansion of "landlordism" in the legal system. Being herself in possession of privileged lordships and estates, she contrived to gain before all else an extension of the power of private jurisdiction; and in conjunction with the secular magnates she thrust down the free people deeper and deeper into the condition of a dependent tenantry. The entry of the most noble classes into the Church had been a blessing in those times, during which she had to accomplish, in the face of violent selfishness, the great task of educating the people. But after she had herself become the greatest propertied power, and especially after Danish times, she appears ever more deeply bound up with the interests and the dissensions of the order of Thanes, in whose factions she took part in a very worldly manner. This worldly mindedness is indeed opposed in the Church by a strong ascetic tendency. But this new tendency is a Romanizing one, which finds its ideal head in Rome, and in the struggle between Dunstan and Eadwig

does not shrink from humbling the power of the King. The Church, in the reigns of Eadgar and Cnut, had become already a buttress of the temporal power. Romish views and Romish proclivities, the traditions of the Roman empire and a capital of the world, the legislation of the emperors and the popes, have all become part and parcel of the aims of the Anglo-Saxon clergy—aims which, from personal inclinations, Eadward the Confessor was only too ready to further. About the middle of the eleventh century all these hostile elements in the State presented themselves in such a combination that a strong will alone would have been able to cope with them. The reign of Ælfred the Great and his immediate successors had pointed out in all departments the direction reforms must take in order to restore to the State its waning power. But the dynasty of Cerdic was not destined to remain the creative power in England beyond the single century of its glory. Whilst want of public spirit, disputes, and open violence were conspicuous at all points, the Anglo-Saxons in this critical period experienced the misfortune of having a personally incapable royal family. The settlement of the warlike Danish Thanes had severed the ties which once bound the Anglo-Saxon magnates to the royal house. Beside them stands a powerful and intriguing band of Prelates, who, associated with the families and proprietary interests of the nobles, are bent on the consolidation of their own power internally, and the insuring of their own privileges, whilst externally they aim at extending the sphere of their power, partly by a closer union with Rome, and partly by an alliance with the Norman duke. With the decay of the old county constitution, with the ever stronger oppression and deeper humiliation of the freemen, national feeling and national strength sink down, and the country is prepared for becoming the prey of the foreign conqueror. It is always the military constitution which is the weakest point in this organization of the Anglo-Saxon State, a weakness which shows itself in the fact that the united kingdom could never entirely obtain the mastery over its British and Scotch neighbours on the borders. All the good institutions fall into decay, the burghs and strongholds are neglected, and the soldiers' guild of Cnut is soon dissolved. A few decades of peace, and the non-appearance of any foreign foe, appear sufficient to cause a relapse into the old state of carelessness in which men's minds are only occupied with the struggles of the nobles, and with the Church. From Church and State harmony and self-dependence have disappeared. (3)

(3) As to the ecclesiastical antipathies of later times, cf. Chapter V., Note \*\*. Under King Eadgar internal

peace and order are certainly restored, but this is apparently due to the fact that Archbishop Dunstan rules in the



Dismal indeed as the picture of the last generation appears to an historian, yet out of the confusion of this epoch two bright features gleam forth, features which the changes wrought by time have not been able to efface. The first is the preservation of the Germanic judicial system which still surrounded personal freedom with protecting barriers. Judgment delivered by peers (*pares*) and the forms of compurgation might fail the weak man as against the powerful man; but they remained a strong bulwark against the arbitrary action of royal and manorial magistrates. Even in the beginning of its decay the Anglo-Saxon judicial procedure still gave the impression of a fair trial; accordingly it was for this reason that the fundamental principle of "trial by peers" was ever jealously clung to by the heavily burthened ceorl, as the point

King's name. During the long miserable period of Æthelred II. the prelates in general appear devoid of character and untrustworthy. In the statutes of these times the moral condition is visible in the serious warnings which are especially addressed to the clergy (*Æthl. v. 4. seq. ; iv. 2; Cn. i. 6, 26*). In Eadward the Confessor, as well as in Godwine and his military dependents, are embodied two great contrasts in the life of the later Anglo-Saxon period. The King, educated in exile upon the soil of France, is disgusted with the drinking bouts and manners of the Anglo-Danish magnates; and the clerical chroniclers with their Norman leanings love to describe the rough national manners, the drunkenness and coarse debauchery of the nation. Eadward tries to escape from the secular high life of his times into quiet monastic rest; but there again the national Anglo-Saxon feeling of the clergy in their deviation from the Roman Church annoys him. He is a foreigner in his manner of life, and he surrounds himself with the friends of his youth, and with French chaplains, whom he makes Bishops. The court-language is already Frankish. Frankish body guards and Frankish *geréfas* of the burghs at last drive the Danish Thanes into open opposition, which ends with the victory of Godwine; and the King is henceforth placed under the guardianship of the secular magnates. According to a credible record, in his last hour the childless Eadward appointed his brother-in-law Harold to be his successor. But Norman writers suppress or deny this decisive fact. On the other side a former verbal promise is

quoted, which Eadward is supposed to have given in favour of the Norman Duke William, and which Harold is said to have acknowledged with weighty oaths, when he found himself by chance in the power of the Norman duke. The latter part of Eadward's reign is a network of intrigues within the oligarchy, among which a portion of the high born clergy already regarded with hope the Norman duke and the new Frankish culture. A number of the spiritual lords had long since turned to the rising sun, and prepared for the open espousal of the Conqueror's cause. In the decisive struggle for the national existence of the realm, Harold found himself almost entirely dependent upon the strength of the old kingdom of Wessex, in which State and Church, Thanes and people, still held together more than elsewhere. When the great army of the Norman duke had already set foot upon English soil, the military array of Mercia, and the greater number of the secular magnates still held aloof from the conflict in faithless neutrality. The decisive battle of Hastings (*Senlac*) was only a struggle made by the peasant army of Wessex, with numerous followers and mercenaries. The men of Kent, the national army, in the consciousness of fighting for the national existence, struggled with a persistence and bravery which seem to show that with all the dissensions and degeneracy of the ruling classes, the heart of the Saxon people generally was healthy. A striking picture of this decisive struggle is given by Freeman (*"Norman Conquest,"* iii. 450-507).

which alone lends value to the legal conception of freedom. Even in the greater lords' courts the old *ordo judiciorum* appears to have kept its place. A formal court assembly of the soccagers (theningmanna gemôt) is indeed mentioned in the case of royal soccagers (Cod. Dipl. 1258). The feelings of the Anglo-Saxon Thanes did not incline towards arbitrariness and severity, and the later accounts show us at least that in the private courts a regular practice had become formed, as well as a manorial system, which differed according to the locality. The confederate element in the tithings, and in the various voluntary unions or guilds into which the inhabitants round the burghs entered, preserved some vigour to the institution for maintaining the public peace. The second permanent legacy was the development of family life and of the character of the people by the national Church. It is true, that in no other European country had the conversion to Christianity left behind it such deeply rooted and enduring effects as here. This fact is only apparently concealed by the later attitude of the superior clergy, and by the faithlessness of Danish Thanes, in whom the new Christian dogmas had not yet overcome the old spirit of Odin-worship. But so far as the Christian element was permanently blended with the national Anglo-Saxon, there was manifest in high and low a moral core of benevolence, truth, and faith, which found expression in the mild sway of the Anglo-Saxon lords as contrasted with the rule of their greedy successors. On these foundations it was possible to build up afresh a vigorous monarchical system. But what the weak and expiring dynasty of the Cerdics was unable to compass was, through the dispensation of Providence, to be vouchsafed to this country by the hand of a foreign conqueror.

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## SECOND PERIOD.

## THE ANGLO-NORMAN FEUDAL STATE.

## CHAPTER VIII.

## The Property Bases of the Norman Feudal State.\*

WILLIAM I, 1066-1087  
 WILLIAM II, 1087-1100  
 HENRY I, 1100-1135  
 STEPHEN, 1135-1154

HENRY II, 1154-1189  
 RICHARD I, 1189-1199  
 JOHN, 1199-1216  
 HENRY III, 1216-1272

WITH this period State and society enter into new relations. The Anglo-Saxon Commonwealth appears suddenly invaded by a conquest, by the thrusting in of a tribe originally northern, which, on the soil of Normandy, had adopted French language and customs, and brought over with it a peculiar military and legal system. The Duke of Normandy is recognized as King of England by a formally summoned National Assembly. The old controversy, whether William the Bastard conquered England, or under what other title he acquired

\* From the sources and literature I may specially mention—(1) (a) The so-called "*Leges et consuetudines quas Wilhelmus rex post acquisitionem Angliæ omni populo Anglorum concessit tenendas*," for the most part not new decrees, but Anglo-Saxon law, in so far as it was recognized by the Conqueror (with certain additions, for example, c. 22, 31) in a Latin and French text. To these is added (b) a short statute having reference to the criminal procedure between English and Franks in an Anglo-Saxon and Latin text; (c) "*Carta Wilhelmi Conquistoris de quibusdam statutis*," etc., in Latin text, with distinct traces of interpolation; (d) "*Carta Wilhelmi*" concerning the separation of the spiritual jurisdiction from the temporal, which, according to Spelman, must be placed about the year 1085 (cf. Schmid, "*Gesetze der Angelsachsen*," lvi. to lxi. and the copy pp. 322-357). Without doubt the

first-named, "*Leges Wilhelmi*" contain real ordinances, which have only in later times been brought into the form of a continuous statute. The genuine originals are to be found reprinted in Stubbs' "*Select Charters*," pp. 83-85. The so-called "*Leges Henrici I. et Eduardi Confessoris*" are private works dating from the twelfth century, containing Anglo-Saxon law as applied under Norman rule, and hence given under the Anglo-Saxon records of law.

(2) The legal works of Norman jurisprudence are, Glanvill, "*Tractatus de Legibus et consuetudinibus Angliæ tempore Henrici II. compositus*" upon the procedure in the *Curia Regis*, printed among others in Phillips' "*History of English Law*," vol. ii.; Bracton, "*De Legibus et consuetudinibus Angliæ*" (London, 1640), an exhaustive exposition of the private law and procedure of the period from 1240-1255 (a new edition by Travers

possession of the country, may be considered as decided by the Conqueror himself, who declared that he had entered upon the possession of the country as the designated testamentary heir and legitimate successor of King Eadward.

This was the only manner in which the new monarch could gain the permanent obedience of his new subjects and make a stand against immoderate pretensions on the part of his followers. It was not, therefore, the tribe of the Normans, but Duke William who had got possession of the country, with a title from the pretended will of Eadward, with the consent of the highest authority in the Church, and with the consent of the National Assembly, by means of numerous allies and paid soldiers. As a matter of fact, as well as of right, it was possible to treat the country in this way as a

Twiss); Britton (Ed. by Nicholls, 1865) and Fleta, two abridged law-books dating from the time of Edward I. A general survey of the legal sources of this period occurs in Biener, "Engl. Geschwornen-Ger.," vol. ii. App. vi., pp. 83-99. A copious survey of the history of the French, Norman, and English sources of law is given by Brunner in Von Holtzendorff's "Encyclopædie," ii. 4. A new contribution to the collection of the sources is M. M. Bigelow's "*Placita Anglonormannica* from Will. I to Rich. I." (London, 1879).

(3) State Treaties and Administrative Records of the Norman times in Rymer's "*Fœdera, conventiones, litteræ* etc." (new ed. 1816 to 1830; 3 vols. in 6 parts, A.D. 1066-1391). The administrative records, which from King John downwards were chronologically enrolled, and lately in part described, and in part published by the Record Commission, fall into the following principal groups: (1) Patent-rolls from 1200-1483, formerly preserved in the Tower, containing the regular acts of Government inclusive of foreign treaties, grants of offices, privileges, etc. Cf. "A description of the Patent-rolls in the Tower of London," by Duffus Hardy, (1835). "*Rotuli litterarum clausurarum in turri Londinensi asservati*," 2 vols. (2) Law Court records and pleas since Hen. II., printed in part, "*Placitorum abbreviatio*" (London, 1811); "*Rotuli curiæ regie*," ed. Palgrave. (3) Calculations and Transactions of the Exchequer, partly in print (*Rotuli oblationum et finium*, *Magnus Rotulus Pipæ*, etc.). In addition the "*Dialogus de Scaccario*" in Madox; "The History and Antiquities of the

Exchequer of the Kings of England," 2 vols. (London, 1789) is, through the reliable reprint of the Records, a book of great general value. As to the State Land Register, Domesday Book, see note \*\*\*.

(4) Treatises on the History of English Law: Sir M. Hale's "History of the Common Law," 2 vols. ed. Rimington (1794); Reeve's "History of the English Law" (3rd ed., 1814). A curious, but much used and useful collection is to be found in "*Henrici Spelmanii Codex legum veterum statutorum regni Angliæ ab ingressu Gulielmi I. usque ad annum 9 Henr. III.*" Printed from Spelman's papers by Wilkins, p. 284 *et seq.*, and in Howard, "*Anciennes loix des François*," Rouen, 1766, vol. ii. pp. 120-428. An excellent exposition of the sources with introductions is that by Bishop Stubbs, "Select Charters" (1874), pp. 79-425. For the legal procedure, cf. M. M. Bigelow, "History of the Procedure in England from the Conquest" (London, 1880); Forsyth, "History of the Trial by Jury" (new ed., 1857); Brunner, "Entstehung der Schwurgerichte" (1872).

(5) General History of England: Lytton, "History of Henry II." (London, 1767), 3 vols.; Hallam, "Middle Ages," cap. viii.; Leppenberg-Pauli, "Geschichte von England," vols. ii. and iii. The principal work on this period is Freeman's "History of the Norman Conquest of England," vols. i.-vi. (the first two volumes in the 3rd edition). Important additions for the Norman period are also given by Stubbs, "Constitutional History," vols. i., ii. (1874).

personal acquisition, as the "Seignury," "Dominion," "*terra regis Anglica*," "*terra mea*"—a designation frequently found in the records: "*Gulielmus I. conquestor dicitur, qui Angliam acquisivit*, i.e. *acquisivit* (purchased), *non quod subegit*" (Spelman, Glossary). The mutual relations of the Saxons and *Francigenæ*, however, remained for many generations hostile. The conquered people repaid the haughtiness of the victors by attempts at rebellion; and when these failed, by silent animosity towards the new lords and their French customs. The best way of considering the period is therefore that of a permanent military occupation which (with its numerous fortifications and the maintenance of paid soldiery) led to a thoroughly new military organization. But the same change was also founded on the needs of the country. The Anglo-Saxon Commonwealth had fallen through internal dissension, a defective organization of its military array, and the faulty distribution of the military burthens. To regain the unity and power that was lost, in the place of a discordant system of national militia and personal vassalage, the whole of the landed property in the country, so far as it was able to bear the necessary burden of heavy armed troops, had to adopt the principle of a standing army based upon the revenue derived from the land. This was almost a common need with all the Germanic states that had risen on the ruins of the old world; and in the centuries of striving after it, isolated elements of the feudal system appear already in the Anglo-Saxon period. But there was still wanting such a permanent and uniform bond of service as was compatible with the personal freedom of the obeying party and the honour of a freeholder; hence the manifold preliminary arrangements, attempts, and relapses. The period of the feudal system dates from the time when the feature of military burthens becomes predominant in landed property, and the grants, to which the character of military pay is attached, give the warrior a permanently dependent position. England is the only state in which, through special circumstances, a systematic application of this system was possible, which made the State in some measure the sole proprietor, thence proceeding to a fresh distribution. It was the position taken up by William as the legitimate successor to King Eadward which settled this question also. In treating as rebels King Harold and those who fought on his side, and the Saxons who afterwards opposed William, a legal justification was found for a general confiscation of landed estates. The inheritance of Eadward, the possessions of the family of Harold, and the remainder of the old Folkland were immediately seized as royal demesnes. By virtue of grants, the leaders of the conquering host entered

into the possessions of the rebel great Thanes, and in like manner the warriors serving immediately under the Duke were endowed with estates that had become vacant in the different parts of the country. The great feodaries could either immediately furnish their contingents or do so by sub-infeudation, by which means a portion of the Saxon Thanes, who had not been compromised in the war, could remain as under-vassals upon their old estates. In like manner the possessions of the churches and the monasteries were retained to them, and in some instances even increased. The object that the royal administration now pursued for a century was to impose, upon the whole mass of old and new possessors, an equal obligation to do service for reward. The standard adopted in carrying out this system was approximately that of the five hides possession of the Anglo-Saxon period; yet with a stricter rating according to the value of the produce. At that period an estate of such a productive value would be bound, at the royal command, to furnish one heavy-armed horseman for a forty days' service in the year (*servitium unius militis*).

The legal incidents of these newly-organized modes of property\*\* were only definitely established in the reign of Henry II.; but conclusions and interpolations show us that the royal administration adapted the feudal customs that had been formed in Normandy to the territorial conditions which existed among the Saxons: "*illis* (that is to the Anglo-Saxon laws) *transmarinas leges Neustriæ quæ ad regni pacem tuendam efficacissimæ videbantur adjecit*" ("*Dialogus de Scaccario*"). The English feudal system is made up of these two elements. Five legal incidents stand out here sharply defined, which in some measure differ from the continental feudal system.

1. **The Conditional Hereditability of the Grant.** According to Norman-French custom, such hereditability has been considered the rule in Anglo-Norman fiefs. (1) Yet the form of

\*\* As to the law incidents proper to the feudal system, the views of Littleton, Selden, Coke, and Blackstone are clearly condensed in the comprehensive note of Hargrave to Coke on Littleton, 191. The proceedings at the great act of homage in the court held at Salisbury are recorded in the Anglo-Saxon chronicle in the same terms as they are narrated in the "*Annales Waverlienses*," A.D. 1086; "*ibique venerunt coram eo barones sui, et omnes terrarii hujus regni, qui alicujus pretii erant, cujuscunque feodi fuissent, et omnes homines sui effecti sunt, et juraverunt illi fidelitatem contra omnes homines*" (I. Report on Peer's Dignity, 34). The technical terms of feudal-law,

"feod, feudum, barones, vavassores, felony relief," etc., appear in the Domesday Book here and there mingled with the older expressions. The word "*feudum*" had hitherto occurred in no contemporary source of the Anglo-Saxon law. The term "baron" is said to occur for the first time in a letter from Pope Nicholas II. to Eadward the Confessor (Heywood on Ranks, 210).

(1) The hereditability of the English fiefs down to King John is doubted by Palgrave (i. 385). He says it was at that time that the writ *de terris liberandis* first was framed, that until that day the investiture of the new fief was regarded as the subject of a fresh compact. It is true that the so-called

grant "*dedi et concessi tibi et heredibus tuis*," only means a concession amounting to a continuous military pay. The enfeoffment of the heir only took place conditionally upon his being a man capable of fighting; and that of the heiress only where there was a failure of males, and in order that she might marry a warrior and one acceptable to the military chief. Accordingly it was natural that the feoffee could neither sell nor mortgage the estate, nor make it a security for his debts, nor dispose of it by will; and hence follow these further legal incidents:

2. **The Reliefum, Relief.** As an acknowledgment that the feudatory only possessed the estate on condition of doing military service, a certain quantity of weapons and accoutrements or a sum of money were rendered by Norman custom, when a change of the person bound to service took place; out of which proceeded at last a fixed recognition-money of one hundred shillings for each knight's fee. In a certain sense the *Prima Seisina*, Primer Seisin, is an addition to this. For greater security the King, as lord of the fee, could take possession of the estate after the death of the vassal until the successor proved his title, or, where necessary, pleaded and obtained his right, and bound himself to pay the *relevium*. According to old feudal custom the lord could in this way claim a whole year's income. (2)

3. **Feudal Wardship and Marriage.** As it is an act of favour on the part of the feudal lord, to give the fee to one personally incapable of military service, so he can take back

*Carta Wilhelmi* (iii. 5) contains the express assurance: "*Prout statutum est eis, et illis a nobis statutum et concessum jure hereditario in perpetuum, per commune consilium totius regni nostri*." But this passage belongs to the spurious additions, which in Stubbs' "*Charters*" have been rightly repudiated. Nevertheless, in the Norman-Frankish feudal law the hereditability of the fief had become so far established that the King could not deny it without driving the whole of the vassals to resistance, besides the great vassals who were at all times ready for revolt. The hereditability has never from the first been seriously disputed. The weak point lay only in the defects of the administration of justice, especially in the want of a right of action to compel the King to renew the fief.

(2) The reliefs are based upon Norman-French customary law. With regard to the Saxon Thanes the King could also refer to the laws of Cnut ii. 70, 71; and probably this is the mean-

ing of the *Leges Wilhelmi* I. 20, in which with unimportant deviations from the original, the law of Cnut is translated; similarly in Hen. I. c. 14. The question has been materially elucidated by Freeman and Stubbs. The "heriot" in the Anglo-Saxon sense continued as an obligatory duty of the heir to "make payment," but yet herein was recognized an hereditary right of possession residing in the vassal. Now the Exchequer substituted for this position the Franco-Norman feudal idea, according to which the lord is from the first the actual owner, and grants by investiture to the new feoffee a "*dominium de novo*" (Stubbs, i. 261). The payment of the heriot in horses and weapons ceased with the Assize of Arms (27 Henry II.), according to which the weapons of the deceased should always be preserved to the heir. Since then a sum of money, amounting to 100 sh., was fixed for each knight's fee.

the estate, when the heir is a minor, and can exercise in person or through a *custos* the rights belonging to it, and continue this wardship, enjoying the profits, until the completion of the heir's twenty-first year, without rendering any account (Glanvill, vii. 9, sec. 6). As *tutor legitimus* of the ward's person he might also give the heir in marriage when the latter has arrived at a proper age, and on such an occasion can exact money payments; a custom which arose under circumstances when the nearest agnate was wont to drive a bargain concerning the marriage of the ward. In failure of sons, the heiress remained under this profitable wardship until her majority, and when she had come of age, was married by the feudal lord to a husband, who now became the real feodary. In the spirit of the old wardship the marriage of the female ward was also regarded as a money business. The revenue rolls show us how, in Normandy also, female wards were given away for 100, 600, and 700 livres of Anjou (Madox, i. 520; Glanvill, vii. 12, sec. 1). (8)

4. *Auxs, auxilia*. The original destination of the fief as a means of obtaining service for the lord binds the vassal to an extraordinary contribution in extraordinary cases of honour and necessity, notably to ransom the lord who has been taken prisoner, to endow the lord's eldest daughter, and when his eldest son is made a knight (*pur faire Fitz-Chevalier*). These three cases are mentioned in the Grand Coutumier and amongst the Normans in Naples and Sicily as the customary ones, but do not absolutely exclude other urgent cases, especially contributions made by the under-vassals towards the reliefs and aids which their lord pays to his feudal overlord, and for the payment of his debts. (4)

5. *The Escheat, Forfeiture of the fief*, is the last decisive point in which the conditional value of the grant appears. The former takes place when the feudatory dies without heirs capable of succeeding to the fief; a case that must frequently have occurred, inasmuch as, until the time of Henry VIII., there was no right of disposing of lands by will. Still more frequent was forfeiture on account of "felony," which includes almost all important crimes, regarding them from the point

(8) Feudal wardship and marriage are certainly derived from Norman-French feudal customs, for to have founded them upon Cnut's Thane-law (Cn., ii. 72-75) would have been less advantageous for the Exchequer. More exact information is given by Glanvill, vii. 12, according to which the marriage of the daughters of the crown vassal is derived from the *tutela legitima* of the feudal lord; but the right

of consenting to the marriage of every heiress, from the circumstance that otherwise the feudal lord could have a vassal forced upon him. The assent was not to be refused without "*justa causa*," but neglect in obtaining it is punished with the loss of the fief.

(4) The Auxilia will be treated of more fully under the head of Financial Administration.



of view of disobedience towards the feudal lord. The especial harshness of the English feudal law adds to the formal attainder on account of "treason and felony," a corruption of the blood or disability of the descendants to succeed to the inheritance. (5)

These are the five points of the feudal system, round which for centuries the most important dealings with the vassals revolve. As to their origin the oldest authorities are remarkably silent; no statute introduced the feudal system into England, or in any way regulated its details. The charters of William contain merely a general recognition of the conditions of property. Nor is there any trace of bestowals of fiefs through which the Saxon Thanes either sought after or received a re-grant of lands to be held "according to feudal law;" and it cannot have originated in the framing of the deeds of feoffment, for these were only expressly formulated in much later times. It was rather the practice of the finance control and of the courts which in course of time developed its details from the following combination of circumstances.

When the Conqueror conferred investiture upon one of his faithful followers, there lay in the use of the customary words a reference to customary legal relations on the side of the grantee, and of the thing granted.

1. The grantee subjects himself through the words "*devenio homo vester*" to the law, as established in Normandy, and as it is administered according to the custom there; and the Anglo-Saxon cannot in this matter claim a right different from that of the Norman.

2. The thing granted is, as a matter of course, granted according to the rights which the preceding possessor had; that is, with all the burthens and duties which originated in the conditions of the Anglo-Saxon Folkland and land granted to tenants, and in the conditions attached to the alienation of Bocland: the Norman also was in these matters to have no greater right than the Saxon. Where these two relations were not in congruity, the Crown was naturally inclined to put in force whichever right was more favourable to itself. But in other respects it was necessary that the feoffees should be treated as nearly as possible alike. Hence in the Exchequer and the Curia Regis (that is, from a financial as well as a legal point of view) new principles were formed which

(5) The right to property for which no heirs can be found was already found in the Anglo-Saxon law (Cod. Dipl., No. 1035), but, in consequence of the want of a right of disposing by will in the case of the feudatory, attained new and unheard-of dimensions.

Forfeiture on account of crimes is even in the Anglo-Saxon period not confined merely to treason, as is generally supposed, but also took place in the case of other serious crimes. But in the feudal law still stricter principles of felony were also applied.

kept the middle path between Norman and Saxon customs, and blending both together produced after some fluctuation a uniform law. And from these points of view all the details of the feudal law can be explained.

The most important deviation from the continental system lies in the institution of *arrière-vassals*. The Conquest itself and the mixture of nationalities had rent asunder the natural bond subsisting between the great vassals and their followers, so that the Conqueror could successfully put in practice the maxim that every under-vassal and greater freeholder must take the oath of allegiance to the King *immediately*, by which means, as regards military service, all subjects of the realm should be immediately under the King. Consequently every oath of fealty, which is sworn to the private feudal lord, excepts allegiance to the King, "*salva fide debita domino et heredibus ejus*" (Bracton, ii. 35, sec. 8). By this maxim which came into complete operation in England, the key-stone was inserted in the edifice of the feudal state; and a final sanction was added towards the end of the Conqueror's reign, at a great extraordinary court and muster of the feudal militia, held at Salisbury; with regard to which the Saxon Chronicle uses the words: "*Omnes prædia tenentes, quotquot essent notæ melioris per totam Angliam, ejus homines facti sunt, et omnes se illi subdidere ejusque facti sunt vasalli, ac ei fidelitatis jura-menta præstiterunt, se contra alios quoscunque illi fides futuros*" (Chron. Sax., A.D. 1086). By a great act of homage the infeudation of the whole of the landed property in the country was here proclaimed as a law of the kingdom. It was, indeed, an important event in English history, when William made his faithful followers, from the greatest magnates down to the squireless knights and the freeholders, kneel down before him, and placing their folded hands in the hands of their royal master, swear to him the oath of fealty on account of their possessions. This act alone necessarily gave the English political life a different direction from that of the continental states.

Connected with this systematic introduction of the feudal system, in the years 1083-1086 a comprehensive property-register of the kingdom, the "*Domesday Book*," \*\*\* was drawn

\*\*\* The origin of the Domesday Book is described in Lappenberg, ii. 143-154. It was officially printed in the year 1783, in two folio vols.: to which were added four supplementary registers and indices, in two additional volumes of the Record Commission, 1816 (Explanatory treatises by Kelham, 1788; Sir H. Ellis, "Introduction to the Domesday Book," 1833).

Lately, the Latin text has also been printed for certain counties in *extenso*, without the abbreviations (London, 1862, etc.). Thirty-four counties appear, but not the counties of Northumberland, Cumberland, Westmoreland, and Durham, which were as yet not in the secure possession of the Normans; Lancaster does not appear to have been organized as a county.

up with unexampled completeness and accuracy; a register invaluable to the Norman political administration, and equally so, as a trustworthy groundwork, to the historian. A division of the land into knights' fees does not appear in this land register; but a perfect foundation for a future list of fiefs was laid in it by the registration of townships and hides, embracing not only agricultural soil, but landed property, with all its appurtenances in the shape of customary services, dues, and safe-conduct money. The existing conditions of the land and soil remain in the lower stratum unchanged, but henceforth they form material for new tenures in accordance with feudal law.

At the head of these masses of property stands the King with a reservation of more than one thousand manors, together with numerous chases, parks and forests, formed out of possessions, for the reservation of which the old relations between the Saxon royal house and the Folcland gave a good title. The former possessions of the great Anglo-Saxon Thanes, and county Thanes, which had become vacant by death, flight, and outlawry, form the principal material for providing for the vassals of the King; the Saxon Thanes who still remained in possession are to be found principally among the *subtenentes* of the Norman magnates. The possessions of the Bishops and the monasteries are incorporated into the new system of property, with the proviso of a duty to furnish their contingent to the feudal militia. The freeholders who still existed, the landowners bound to magisterial duties (*sochemanni*), and the *burgenses* kept their places almost unchanged. In like manner the Anglo-Saxon peasants, *ceorls*, *villani*, remain as they were; also the farm labourers (*bordarii*), although these also were partially supplanted by servants whom the Norman lords had brought with them. In the still remaining serfs (*servi*), who were few in number, no change can be seen. As Domesday Book states the several modes of property existing at the close of the Anglo-Saxon period (*tempore Regis Eduardi*), as well as those at the accession of William, and when this land-register was framed, the changes which had taken place in these descriptions of property may be surveyed from the following table:—

<i>Tempore Eduardi.</i>		<i>Tempore Wilhelmi.</i>	
Chief proprietors and others	1,599	Vassals of the Crown . . .	600
King's Thanes . . .	326	Subtenentes . . .	7,871
Milites . . .	213	Liberi homines . . .	10,097
Tenentes et subtenentes .	2,899		

until Henry III.; London, Winchester, and certain other cities are also wanting. The attested sum total of the

men was 283,242; that of the registered "hides" about 225,000.

<i>Tempore Eduardi.</i>				<i>Tempore Wilhelmi.</i>			
Ecclesiastici	.	.	1,564	Ecclesiastici	.	.	994
Sochemanni	.	.	23,404	Sochemanni	.	.	23,072
Burgenses	.	.	17,105	Burgenses	.	.	7,968
Villani	.	.	102,704	Villani	.	.	108,407
Bordarii	.	.	74,823	Bordarii	.	.	82,119
Cottarii	.	.	5,497	Cottarii	.	.	5,054
Servi	.	.	26,552	Servi	.	.	25,156

Hence we perceive that extensive changes have only taken place in the great landed estates, and that in the course of the Conqueror's reign the last Saxons have been ousted from the lands and from the position of great Thanes and Bishops. The grades of landed proprietors at this time are therefore as follows:—

1. About six hundred persons and corporations appear as secular and ecclesiastical Crown vassals (*tenentes in capite*), but in very different degrees. About forty lords (the later *Barones majores*) are enfeoffed of an aggregate of estates, which may be compared with the lordships of the Saxon great Thanes, but they are scattered about in different counties. About four hundred warriors (the later *Barones minores*) who served immediately under the Duke, were enfeoffed of single knights' fees or manors. The line of demarcation between the two is in this period merely one founded on fact, and a changing one. Among the spiritual lords the landed possessions of the majority of the Bishops and certain great abbots may be compared with those of the great secular feudatories; the great majority of fees are also, from this point of view, small. It is only when many small and doubtful forms of possession are added to these that the number of 1400 *tenentes in capite* appears, as given by Ellis. (1)

2. The second rank is formed by 7871 *subtenentes*. As the greatest feoffees had to furnish a whole company of heavy armed soldiers, subinfeudation was a suitable, if not a necessary, method of furnishing the contingent due. For the Norman soldier this signified a fresh grant on the part of his chieftain; for the Saxon Thane, who was left in possession,

(1) The number of the *tenentes in capite* is given by Ellis at 1400, but many very obscure elements are reckoned among this number. The extracts referred to in Kelham, give as follows:—

(a) Ecclesiastical entries; 19 Archbishops and Bishops (among them a few Normans); 20 *Canonicis*; 56 Abbots, Abbesses and Abbeys; 38 *Ecclesie*; 11 *Presbyteri*; 2 *Diaconi*; 8 *Capellani*; altogether 153 single entries.

(b) Secular lords; 10 *Comites*; 394 other lords (among whom 214 are

registered in one county, 180 in two or more places); 10 *Comitissæ*; 20 other women and daughters, and a few collective appellations, *Homines Liberi Regis*, etc.

I accordingly assume the existence of at least 600 Crown vassals in round numbers. The Anglo-Saxons had already been ousted from the greater possessions; Waltheof is mentioned as being the last Ealdorman, and Wulfstan as the last Bishop. Among the small Crown vassals, however, we find many with Saxon names.

it meant a limited recognition of his possession with fresh burthens. At the time of Domesday Book the partition of great estates into subfees had only been begun in a limited degree. But Crown vassals and corporations are even then both met with as under-vassals. (2)

3. The rest of the population, who were not subject to military service, were mostly, though not entirely, incorporated with the great estates in which they had for the most part a precarious or heavily burdened possession, to which were added also certain other burdens by reason of the feudal duties of the lord of the soil. As a constant companion of the feudal system is now added a tax duty (*tallagium*), to which all inhabitants of town and country were subject, who were not bound to the feudal military service. The chief groups are:—

10,097 *liberi homines*, among whom, however, the names did not yet imply possession of freehold estates. (3)

23,072 *sochemanni*, hereditary possessors, who are only subject to the magisterial jurisdiction (*soca*) of a landed proprietor without being incorporated with an estate as tenants. (4)

(2) Among the 7871 *subtenentes*, about one-half of the names are still Saxon; the Domesday Book makes mention of "taini" in nearly all counties (cf. Heywood, pp. 85, 120, 135, 200, 208; see also Ellis, i. 143). Division of large estates by subinfeudation permanently deprived the great vassal of the enjoyment of proprietorship, and was therefore avoided as much as possible. Only for the spiritual corporations there existed from the first a certain necessity for this course. It is expressly declared of Archbishop Lanfranc that by order of the King he enfeoffed the farmers on his lordships (the "threnges") as under-vassals: *præcepit rex, ut de eis milites fierent ad terram defendendam*. Especially for the landed estates of the cathedral chapters ten knights were enfeoffed, and for this purpose lands of the value of £200 were assigned. On the other hand, under William Rufus, the Abbot of Romsey was still allowed to furnish three knights to the feudal militia, without a formal subinfeudation (Stubbs, i. 262, 263). It is apparent from many instances that ecclesiastics and great vassals, with the royal licence, freed their whole estates from furnishing feudal troops, by creating by subinfeudation a certain number of sub-vassals once

and for all. Landed estates belonging to abbeys are frequently mentioned, which, once granted to English Thanes, became under William subinfeudated in accordance with Norman feudal law (Freeman, iv. 479).

(3) Of the 10,097 *liberi homines* and 2041 *liberi homines commendati*, 4487 are met with in Norfolk, and 7470 in Suffolk, that is in Danish counties. According to the Dane law the compensation for the *liber homo* was three marks, that of the *socmannus* only twelve oras. Hence the appellation would seem to express a somewhat higher grade than that of the *socmannus*, although other passages seem to make this doubtful. The old *commendatio* was also interpreted by the Normans as a subinfeudation, though it merely signified the finding of a landlord as an act of agreement between the lord and the "commended." In the land register this relation is treated of as an *oblatio feudi*, and consequently as a transferable "real right," residing in the feudal lord (Freeman, v. 463, and Index, s.v., "Commendatio").

(4) The 23,072 *socmanni* are recorded in almost exactly the same number as existing at the time of Edward. The institution must accordingly be based on a fixed legal conception, and this

7968 *Burgenses*, the great decrease in whose numbers is explainable from the desolation caused by the war. (5)

108,407 *villani*, the new term for settled ceorls or the proper villeins. (6)

82,119 *Bordarii*, that is, agricultural servants, workmen, and labourers, but who were often in possession of houses and small plots of land. (7)

The rule which determined the further development of these conditions was manifest: namely, that the Saxon could not claim more than the Norman, and that the lower classes (apart from the obligation to feudal military service) must subject themselves to the limitations and burdens laid upon them by the upper classes.

By the extension to these classes of the oath of fealty, the reliefs, escheats, and forfeitures, it came to pass that after many generations the maxim of jurisprudence was formulated "that the King is the universal lord and original proprietor of all the lands in his realm, and that no one possesses or can possess any portion of them, which is not derived mediately or immediately from a grant by him." The new order is a thorough arrangement of society into ranks according to

can only be the Saxon legal jurisdiction. In the treatise of Spelman, "*De Natura Brevium*," they are mentioned as having a title with specified services, as suitors exempt from the common popular courts, and only really bound in their own court, and capable of having others in *villanagio* under them. Certain soomen are met with again as under-vassals, and in possession of a whole manor (Elm, ii. 389).

(5) The *Burgenses* had been reduced by war from their original numbers (17,105); Domesday Book describes the condition of decay and the number of forsaken houses in many individual towns.

(6) The *villani* (108,407) embrace the mass of the Anglo-Saxon ceorls in the position of peasants on the lord's estates, as well as a number of the old peasant proprietors and hereditary possessors, at the time of Domesday Book. It is difficult to believe that among the still doughty array of the peasants of Wessex and the "men of Kent," an hereditary proprietorship should have wholly vanished. As to the degradation of the *villani* in this period, see below in cap. xx., paragraph iii. For the rank of the "*liber homo*," the possession of a peasant farm was without any decisive influence:

"*Item tenementum non mutat statum liberi non magis quam servi. Poterit enim liber homo tenere purum villanagium, faciendo quicquid ad villanagium pertinebit, et nihilominus liber erit, cum hoc faciat ratione villanagii, et non ratione personæ suæ*" (Bract., ii. c. 8).

(7) The 82,119 *Bordarii* are regularly mentioned in the Domesday Book after the *villani*, as being still inferior to these. According to Du Cange, the term answers to our "cottager," that is, denotes the labouring classes, to whom, in addition to their dwelling, a garden and a few acres of land had frequently been given.

A survey of these conditions is rendered more difficult by the fact that the Latin text of Domesday Book very frequently translated the Anglo-Saxon terms in an arbitrary manner; that the commissioners in the different counties did not make use of a uniform rule of expression, that one and the same term might embrace locally different legal relations; that on the other hand similar conditions were denoted in different places by different legal terms; and, finally, that our knowledge of the smaller kinds of property is exceedingly defective. As to the state of things at the close of this period, *vide* below, cap. xx.

military service, an immediate and effectual subordination of the upper classes in military obedience to the King, and consequently a still stricter subordination of the lower classes. The whole landed property became thus uniformly subservient to the State, and has remained so to this day.

The legal construction of the English Feudal System was deduced by the author of this work in the second edition of his "Englische Communal-Verfassung," and his "Englisches Verwaltungs-recht" (1863-1867), from the legal sources and printed records then available, but has been since that time completed and rectified by the copious investigations of Freeman, "Norman Conquest," vols. iv., v., and vi. (1871-1879), and Stubbs, "Constitutional History," vols. i. and ii. The material result of these valuable investigations (with a few supplementary additions on my part) are as follows:—

The belief which has come down to us from Selden and the antiquarian school, a belief which was hitherto universally received, that William I. divided the English landed property into military fees, is erroneous, and results from the dating back of an earlier condition of things. Equally erroneous is the statement which has been repeated for centuries, that the English real property was at a certain period distributed into 60,215 knights' fees, of which 28,015 were in the possession of the Church, and the rest in the hands of secular vassals. These computations were arbitrarily set up by later antiquarians, by reference to the number of the hides, and are at least twice as high as they should be. The figures in this case are among the many numerical exaggerations of the older historians.\*

Domesday Book does not contain a "fee-roll," but a "property-roll," upon which in later times the fee-rolls were framed. Palgrave rightly maintained that in that great register there is nothing to be found about "knights'-fees" as a special kind of tenure of landed property. The term *feudum* is, in the language of the land-register, a general expression for landed property under the new ruler. The term *miles* appears, as a rule, to be merely a translation of the Anglo-Saxon "thegn." Domesday Book simply describes the real property with its customary burdens and services, without making any mention at all of new burdens and

\* The estimate of Higden in the "Polychronicon" (l. c. 49) of 60,015 knights' fees is contradictory of the fact that the Treasury itself could at no time give a correct estimate of the number of knights' fees. From Higden that number passed into the so-called "Eulogium," out of which again Selden, in his notes to Fortescue, has

accepted the quotation, and has made of it a *tralatitium*. Cf. Stubbs, i. 424. At the close of the period, Stephen Segrave, a minister of Henry III., computes the number of knights' fees at 32,000, and even from such a number the knights' scutage could never be raised.

services resulting from the new feudal bond, and even without any intimation that the new military service is different from the old. The land is not divided into knights' fees, but into *hidæ*; where the "men" of one or other great landlord are spoken of, the expression evidently refers, as a rule, only to the old Anglo-Saxon vassalage, or to the *commendatio* to a Hláford as an institution of the Anglo-Saxon police control. It was only in the succeeding generations that the feudal military service was definitely apportioned on the basis of this register, and that the claims of the royal feudal lord in the exchequer were consistently enforced.

The occupation of the country after the battle of Hastings began with those counties from whose levies Harold's army had been formed. In these a general confiscation of the landed property of the "rebels" took place, so that among the *tenentes in capite* scarcely a single Saxon name can be found. From thence the Conquest spread further towards the West and the North, until in 1070 the occupation was mainly completed. In this further occupation the principle is still adhered to, that participation in the struggle against William, as the legal heir to the crown, entailed as a legal consequence, not indeed, outlawry, but forfeiture of landed property; as the result of which re-grants were at once made to Normans and to certain favoured Angli. Those Angli, on the other hand, who had not taken part against him, or who had compromised themselves less, were allowed, by "redemption," to receive back their possessions from the King, as an act of his favour; accordingly, those who participated in his grace, received a royal writ (*breve*), which appears from that time necessary and sufficient for all purposes as a title of possession. The technical term for this is "*inbreviare*." According to the diversity of various cases, the *inbreviatio* is bestowed in consideration of small, greater, and often very large dues, and the "redemption" is granted either for the whole or only for a part; widows and poorer members of a family are sometimes allowed a small portion as a charitable provision. The theory and manner of expression of this "redemption," which are consistently maintained throughout Domesday Book, make it appear as a royal gift, by which the new lord of the whole country allows the former possessor a certain share in the soil. Later jurisprudence was able, accordingly, to deduce, with plausible reasons, from these "redemptions" the character of a conditional grant (tenure). The ecclesiastical estates alone were conceded to the corporations who were in possession of them, without the humiliating form of *inbreviatio*, because the theory of personal forfeiture appeared not to be applicable to them. Yet in the next reign,



the system of tenures in all its bearings was extended even to these.

The landed property thus granted or redeemed was, according to the Conqueror's plan, to be uniformly employed in forming the heavy-armed feudal militia. To the newly enfeoffed Norman lords this was the natural feudal custom of their country. To the newly enfeoffed Angli and to those who had redeemed their possessions, it appeared in the light of a just equalization. Yet the accomplishment of this scheme was not effected under William I. In the carrying out of it the difficulty with which the Anglo-Saxon administration had struggled for centuries immediately returned: a fixed standard for the apportionment of the soldiery was wanting. Since Ælfred's time, indeed, the general rule had been observed that a fully equipped man should be furnished for every five hidæ; but it had never been established as a rule of law as in the Carlovingian legislation; the apportionment had remained a matter of administration, regard being had to the state of the income at the time and to other conditions, and hence it was for the sheriff and the county administration an object of continual claims. Only in a few places a local legal custom had become established, which accordingly was carefully noted in Domesday Book.\*\*

Apart from this, the apportionment of the cavalry service (which had now become more expensive) under the new schemes of property, and the valuation of the real estates according to their productive worth, was certain, after so many changes and desolating struggles, to lead to more violent

\*\* In my "Geschichte der Communal-Verfassung," p. 17, I have pointed out that the fixing of military service according to the standard of the hide had not in the Anglo-Saxon period become a rule of law. It occurs accordingly only incidentally in Domesday Book. In a few cases in the royal grants the number of the warriors to be furnished was determined by privilege, which number was therefore not to be exceeded. Thus in the case of an important grant about the year 800: "*Verum etiam in expeditionis necessitatem viri quinque tantum militantur.*" (Coenuulf, 799-802, in Kemble, "Codex" Introd. p. li.) And again shortly after this "*expeditionem cum duodecim vasallis et cum tantis acutis exerceant*" (idem, 821). In the latter case it was a matter of a grant of some twenty townships to a monastery (Cod. Dipl., i. 272). That where great grants were made to churches and monasteries a definite number of warriors should

be expressly reserved was natural, seeing that the contingent furnished by the hundreds remained the same, so that the deficit would have fallen upon their neighbours. In like manner the privileges of the towns in the later Anglo-Saxon times must be regarded; the military service of which is fixed at five, ten, fifteen, and twenty hides, and in which we also meet with a money discharge, Chester paying a sum equal to 50, and Shrewsbury 100 hides (Lappenberg, i. 613). After the Conquest this institution appears as a local custom, as in Berkshire (i. 56. 6): "*si rex mittebat alicubi exercitum de 5 hidis tantum unus miles ibat, et ad ejus victum vel stipendium de unaquaque hida dabantur ei iv. solidi ad ii. menses.*" Because the rate of the five hides was only a principle of administration, it was in practice much modified, and maintained itself as an established custom only in certain counties.

disputes than ever. On the earnest endeavour made to carry out the plan at the time of threatened invasion in the year 1085, the King abandoned the scheme, in consequence of the probability of endless disputes; but he imposed a high tax (*hydagium*) upon the hides, and hurriedly collected a paid army with the other means at the disposal of his exchequer. Connected with this event was the well-considered plan to determine for the future, by means of a land-register of the realm, all the factors according to which, in case of future levies, the number of "shields" to be furnished should be fixed, and the other feudal dues exacted. Upon this basis, after the year 1086, the shares of the great landed proprietors were settled, according to which a heavy-armed man (*servitium unius militis*) should be furnished for each share. The *feuda militum* thus computed are no knights' fees of a limited area, but real portions of the profitable free estate. "The knight's fee is no manor, and no hide of a fixed uniform extent, but a unit of possession which imposes upon the owner the obligation of furnishing a fully equipped man for the usual period of a campaign. These 'units of property' comprise not only agricultural land but buildings, rights of cutting timber, mills, fisheries, salt and other mines, tolls, market dues, tithes, etc.; and also, as the furniture as it were of the soil, the mass of tenants, the greatest cities as well as the smallest villages, and single farms, the formerly allodially free peasant as well as the serf who had settled on the land, with all customary services, dues, and protection moneys. Throughout the whole of the Middle Ages the normal standard of a knight's fee is not the acre-measure but a ground-rent of 15, and in later times generally of 20 lbs. of silver."\*\*\* The judicial and police system appertaining to a manor are independent of this; a manor may be estimated at either more or less than a knight's fee, and as such has no connection with knights' service. It was only after a lapse of time, and in a limited degree, that knights' fees began to be settled on certain and determinate estates.

Accordingly, after the land register of the realm had settled

\*\*\* I may repeat these words from the second edition of my "Englisches Verwaltungsrecht," as they appear to have accurately hit the material point. Under Henry II., after the knights' fees had attained their fullest development, there are to be found in the *liber niger*, *feuda militum* of 2, 2½, 4, 5, and 6 hides. For example Geoffrey Ridel tells us that his father possessed 184 *carucate* (= 100 acres), for which the service of fifteen knights

was due, but that no special knight's fees were formed out of them, but the obligation lay jointly and separately upon each *carucata*. Hence even in those times, a valuation according to the productive results was in existence, without dividing up the estates into separate knight's fees (Stubbs, i. 264). A copious use of extracts from the Domesday Book has been made by Freeman (Vol. v. Append. A, B, C, D).

the factors for the distribution of war burdens for the later generations, William found himself enabled to fix the keystone of his system, by the universal, fundamental and immediate obligation to allegiance, in which he included not merely his own immediate crown-vassals but their under-vassals also, as well as all the greater freeholders in the country, "*omnes prædia tenentes, quotquot essent notæ melioris per totam Angliam*;" and his contemporaries have understood his act in its fullest extent, "*milites eorum sibi fidelitatem contra omnes homines jurare coegit*" (Florence). During the Norman reigns which follow consequences in all directions proceed from this basis.

The Norman Crown, as the heir of the Anglo-Saxon, retained all the powers and revenues of its predecessors, and as supreme feudal lord over all the land added to these the newly acquired feudal rights. The King claims obedience, military service, and tribute, in both characters; all *homines* are his men; he can summon them to his army, cite them to appear in his tribunals, can rate them in respect of his revenue, without the intervention of an intermediate lord. It is difficult to say what immense consequences might not have proceeded from this twofold position, if, after the fashion of all human affairs, a limitation of them had not arisen in another direction through the circumstance that all royal governments of this period began with a dubious or disputable title, and had to struggle with dangerous risings on the part of the great vassals, which took place either alternately or simultaneously in England and on the Continent. Immediately after the occupation of England begins the dangerous insurrection of Ralph Guader and Roger, the son of Fitz-Osborne. For a whole century, until the death of Henry II., these revolts continued on the part of the great vassals against the English feudal lordship, which they considered insupportable; they end with the removal or degradation of all the great families which at the time of the Conquest stood at the head of the martial nobility. In all these struggles the national Anglo-Saxon element cleaves with unshaken loyalty to the Royal house, and gains accordingly the most material concessions from moral, as well as from political considerations. The vouchsafing to all a like legal protection, the established system of the central administration, the consolidation of the constitution of the counties, cities, guilds, and all the elements which afford a counterpoise to the "great vassalage," spontaneously urge themselves upon the Anglo-Norman King as the policy which this state of affairs requires, without partiality either for the one or for the other nationality.†

† I may for the following survey of the reigns in Stubbs' "Select refer my readers to the excellent sketch Charters."

William Rufus already makes his "Angli" significant promises, in order with the help of their faithful soldiery to humble the insurgent magnates, though he certainly does not keep his word. Indeed, the Royal feudal suzerainty was turned to account in this reign rather with a display of savage brute force and of greed for money. A quick-witted cleric, Ranulph Flambard, as Great Justiciary, unscrupulously utilized the fiscal part of the royal suzerainty against ecclesiastical and secular estates, and was the first to bring into operation the grasping fiscal principles of the English Exchequer.

Henry I. begins his reign with a fair-promising Charter, by which he gains the sympathies of the nation for his defective title to the crown. Every sentence of this charter throws an unmistakable light upon the maxims of the preceding administration; and the promises which the King here made he also kept in the main, by returning to the prudent principles of government of the Conqueror. Like the latter, he avoids the re-grant of territory and judicial powers to the great vassals on any large scale. He centralizes the financial control in the Exchequer, facilitates the access to the Curia Regis, in other directions enlarges the competency of the county courts, and amplifies the charters of freedom of the cities and guilds. By the circuits of his Justiciary and the Commissaries of the Exchequer he brings the royal jurisdiction into immediate connection with the provincial administration, in a manner which obviates the danger of a territorial separation of the manors.

Next follows the reign of the usurper Stephen, to the exclusion of Henry's daughter, the Empress Maud, who had been formally appointed to the succession. Stephen's cavalier-like frivolity endeavours to gain the favour of the vassals by extravagant grants of Crown lands, and by laxity in administering the laws of the land. But so soon as the possibility of winning more adherents by this means is exhausted, the defiant opposition of the Barons begins. Even the peaceable magnates and Bishops saw themselves forced in self-defence to fortify their castles, and to prepare for war. In this critical moment Stephen commits the folly of arresting his Grand Justiciary and Bishop Alexander, by which act the clergy are provoked to opposition, and at the same time an orderly political administration altogether ceases. Neither Stephen nor the Empress has any real support in the popular feeling, whilst barons and knights fight nominally under the flag of one of the two claimants, but in reality for their own landed interests. From this time, instead of the former well-ordered administration of the realm, there is seen all the

confusion of the continental feudal system—private wars, fortified castles, the forcible exercise by greater and lesser barons of self-arrogated judicial functions, and of the privilege of coinage—a wild struggle of warriors among themselves, under pretence of siding with Stephen or with Maud, until, by the mediation of the clergy, a compromise is effected in favour of the succession to the throne of Henry, son of Maud.

Henry II. ascends the throne without opposition, and without any obligation towards either party, with the resolve to rule England as an English King, together with his great possessions on French soil. The basis of government and of the county administration created by William I. and Henry I. now received a systematic form. By the union of the royal central administration with the national county courts, the power of the great vassals was driven back into proper limits, and with the support of an energetic and loyal official nobility, the formation of which had begun as early as the reign of Henry I., with the appointment of Roger, Bishop of Salisbury, the Norman administrative system attains its unequalled systematic development. Even amidst the unfortunate family relations and unfavourable external conjunctures which characterized the latter years of Henry the Second's reign, the internal organization of the Exchequer and the Curia Regis, and that of the legal, military, and financial system makes consistent progress. And so also under that knight-errant, Richard I., the internal government, under the conduct of sagacious officers, pursued a course that was in the main orderly; until under the worthless rule of his successor, John, the crisis supervened, which led to the signing of Magna Charta.

Within this framework is accomplished the internal consolidation of a political system, which stands unmatched in Europe in the Middle Ages.

## CHAPTER IX.

## The Norman County Government.

THE Conqueror found on his arrival, a well-ordered division of the country into Shires, Hundreds, and Manorial districts, and a corresponding official system of Earls, Shir-gerêfas, royal and private Gerêfas. For King Eadward's legitimate successor the retention of this system was a natural condition, and a few years' residence in England must have sufficed to convince the Conqueror that his rule could have no more advantageous basis than the Gerêfa-system he found there. The outward fabric of the government of the country thus remained unchanged, but it was enlarged by the new powers that had their origin in the feudal system, whilst in many points it was at the same time limited by the centralization which soon began.

I. The office of the Earl had, in the last two generations of the Anglo-Saxon period, been reduced into the position of an upper governorship, with an ever changing combination of shires, and a frequent change of officials. According to the custom of the country, it involved the highest secular rank, corresponding to the ducal title of the Continent, and continued to do so until the reign of Edward III., for the "*duces*" of Normandy naturally avoided giving their subjects the title of "*dux*." A few Anglo-Saxon Eorls retained their earldoms for a considerable period. In the place of the rebellious Eorls, Norman great-feodaries were appointed. Certain lords apparently received the title of Eorl, only because, in Normandy, they had already been Counts. Usually, though not always, a high military rank was attached to the office, which was conferred by a special ceremony, that of girding with the sword (*gladio comitatus cingi*), but no active command was attached. The rights and profits of the Eorl, i.e. the customary third of the revenues of the county, were at first usually combined with it. But the conspiracy of the Earls in the year 1074, showed plainly enough how dangerous an administration by Earls was to the royal rule. From that time onwards the appointments were made with great reserve; only such persons received them as had already borne the title of "count" in Normandy; in later

times mostly members of the royal family; and in such a manner that the Eorl was removed as far as might be from the actual administration of county affairs. The former administrative office passed into one of the highest dignity, with many honours, but with as few duties as possible. In Domesday Book are recorded the names of ten *comites*, and a like number of *comitissæ*. The greater number of counties accordingly had no *comes*. Wherever we meet with one, no jurisdiction is attached to his person, no command in the army, no authority in the county court, and no special magisterial power of any kind. The Eorl is connected with the county, whence he has his name, in no other way than through the "*tertius denarius*," under the sheriff's yearly lease. The earliest Treasury accounts show the payment of such sums, amounting to £11, £16, £20, £33, etc., under the head of *tertius denarius*. But it is only a *donatio sub modo*, the grant of a permanent income "for the better support of the dignity of an Eorl;" it consists in a mere order for payment or precept addressed to the sheriff, and is therefore a right of demand, but no feudal right, and is accompanied by no investiture. Occasionally the Eorl is also appointed as sheriff, even in his own county, as Cospatrik was under William I. An Eorl of this character must render his accounts to the Exchequer, like any other sheriff, and he is only permitted by warrant to retain the *tertius denarius* (Madox, ii. 164). An Earldom has thus already the character of the later titles of nobility; the same vagueness in the names, which are sometimes taken from a county, and sometimes from a city (such as Salisbury, Winchester, Carlisle), sometimes from a township (Striguil, Clare), sometimes from family names (Warene, De Ferrers). The newly created earl was sometimes allowed a *tertius denarius*, sometimes a fixed annuity, and in later times neither the one nor the other. The dignity sometimes descended to women, and sometimes not, according to the wording of the grant; which from the first appears to rest upon patent. To this rule of government only a few exceptions were made in the border counties (the so-called counties Palatine) which had no influence upon the system of county administration. (1)

(1) As to the dignity of the Norman Eorl, see Spelman's "Glossarium," s.v. *Comes*; Selden, "Titles of Honour," iii. 638, *et seq.*; Heywood, "Ranks," p. 95, *et seq.*; Madox, "Exchequer," ii. 400, *et seq.*; "Baronia Anglica," i. c. 1; Hallam, "Middle Ages;" Ellis, "Introduction;" "Peerage Reports," iii. 178, 211, *seq.* The dispute of the antiquarian authorities as to when the

dignity of Eorl became merely titular is rather a controversy of words. We certainly cannot speak of a mere titular dignity in the case of those *comites*, to whom a third part of the court dues, fines and other revenues, had been granted. (As to their extent, see Heywood, 100, 101, 108.) The decisive question is, how far the *Comes* as such, had a military command, and how far

After the withdrawal of the Eorl, the Anglo-Saxon Shir-gerêfa became the regular governor of the county, who was henceforth no longer dependent upon the Eorl, but upon the personal orders of the King, and upon the organs of the Norman central administration.

II. The important office of the Norman *Vicecomes* is identical with the old office of Shir-gerêfa, now filled by trustworthy Norman lords. Upon French soil there existed a similar system of government under Bailiffs; who as representatives of the duke, himself invested with the Carolingian dignity of count, bore the title of "*Viccomites*." The official Latin in Norman England adopted the title *Vicecomes*, but this did not become naturalized in the Saxon vernacular. The Norman term "bailiff," which nearly corresponded to the Saxon "gerêfa," was in later times applied rather to the under stewards of the *Vicecomes*. For the governor of the county, on the other hand, the native population retained the usual name, Shir-gerêfa, Sheriff, which consequently, in later times became the prevailing one. Corresponding as it did to the Anglo-Saxon administrative system, the office of *Vicecomes* was a four-fold one.

1. As the King's *military representative* his duty was, in conjunction with the county assembly, to regulate the apportionment of the contingents, and conduct the detail business of the military organization. This business became somewhat simplified after registers could be kept with the help of Domesday Book. The sheriff's duty is accordingly, with the aid of such registers, to carry out the royal orders summon-

he controlled the county assembly, and the peace of the county. That he had these powers, upon reference to the governmental documents, must be most decidedly denied; as to the instances in which a Comes governs the county as *Vicecomes*, see Madox, ii. 400. A local exception is made after the Conquest, in the county of Chester, in which, having regard to the necessity of defending the frontier, a general governor was intrusted with the immediate exercise of the *jura regalia*. After the reign of Henry II., such exceptional cases were not unfrequently called "palatinates." Extended powers of this kind were further granted in Shrewsbury, on the Welsh borders, in Durham, on the Scottish boundary, and in Kent, in consideration of the threatened invasions from Picardy. Two of these palatinates were intentionally combined with ecclesiastical dignities which were not capable of establishing an hereditary family suc-

cession. Such governors are generally called Earls, but frequently otherwise, as in the case of the Marchers of Wales; and where they bear the title of Earl, it is only the latter that is hereditary, whilst the governorship is regarded as a perfectly separate grant ("Peerage Report," ii. 255). Under Stephen, new *Comites* appear to be created in great numbers, and with extended powers; but these pseudo-earls were deposed under Henry II. For the origin of the later Palatinate of Lancaster, there were personal reasons in the striving of this house to preserve to itself a family possession, in addition to the crown it had usurped. All these variations, of comparatively small extent, had no determinate bearing upon the constitution of the country. The character of the Eorl, as an originally personal dignity, is recognized by the "Peerage Report," iii. 178, 211, 212, etc.



ing the vassals, which orders are issued to him as executive officer. Where a royal castle belongs to the county, he looks to the equipment of the knights, the serjeants, and foot soldiers, as well as to their supplies, debiting the treasury with all the disbursements. In case of need he also manages the fitting out of ships. In the border provinces he conducts the defence of the county, in case no governor with larger powers has been appointed. After the revival of the old militia system under Henry II., he becomes also leader of the county militia. Wherever for military, judicial, or finance purposes, military administration becomes necessary, it is the sheriff who does the work.

2. As *Royal Justiciary*, the Vicecomes is the successor of the Anglo-Saxon Shir-gerêfa; he presides in the county court, and holds the customary court-days at stated periods in the county as well as in the hundreds. The judges are the county freeholders. Instead of Thanes and freeholders, we now find vassals, under-vassals, and freeholders; and Normans instead of Saxons. So far the judicial administration was able to survive with its framework unchanged. But defective administration of justice and other circumstances led by degrees to a centralization at the royal court, which deprived the Vicecomes of much judicial business; whilst on the other side, the police spirit of the new regime made the criminal sittings the chief business in the several hundreds. In all cases the customary execution of all judgments, the collection of fines, and the confiscation of forfeited lands, remains the province of the Vicecomes.

3. As *Police Magistrate* of the Crown he performs the customary duties of maintaining the peace, pursuing peace-breakers, if necessary, with the "hue and cry" of the whole county; he accepts security for good behaviour, and controls the general surety-system of the tithings. Through the necessities of the times these police functions became much extended, and developed into what was soon an unlimited system of police fines. For carrying out these measures, periodical police-court sittings were instituted in the several hundreds under the name of "*turnus vicecomitis*" and "*visus frankplegii*." The more the judicial functions of the sheriff become curtailed, the more prominent is his character of police official.

4. His office finally as *Bailiff of the royal demesnes* (gerêfa) develops into one of high importance, owing to the form of the Norman administration. As in the Anglo-Saxon period, the management of the royal demesnes is now entrusted to the Vicecomes to administer them as a steward within his district. He takes over these demesnes with the stock upon

them, he makes good the deficiencies as they occur, and covers his disbursements by deductions from the rent according to a fixed scale (Madox, ii. 152). In many counties the remainder of the estates which had been assigned to the Saxon Shirgerêfa to provide his official income (reeveland), were added thereto. The sum total of these estates forms the "*corpus comitatus*" out of which the annual rent due to the King was primarily payable.

In later times, when the "*corpus comitatus*" had become greatly diminished by grants (*terræ datæ*), he only accounts for the "*remanens firmæ post terras datas*," and this too was frequently burdened with current annuities and pensions, which had also to be deducted. An important part of his receipts is formed by the payments made by the tenants to their royal landlord. The payments in kind, consisting in corn, provisions, conveyances, and manual services, appear in Domesday Book as having in great measure been already converted into money, and according to the system pursued by the Treasury, this conversion proceeds, until as early as the reign of Henry I. it has become the rule. To these again are added the customary rights to wrecks, treasure-trove, and the other occasional sources of revenue of the old regal finance, and also (in the province of the magisterial functions) the rights to escheated and forfeited property, to various dues and fines, and to the confiscation of the movables (*catalla*) belonging to executed or fugitive criminals.

The revenue accruing from such suzerain rights was extraordinarily increased by the introduction of the feudal system, and these accretions were more vigilantly guarded by the Norman kings than by their predecessors. The feudal system added *relevia* and other similar incidental revenues, the large pecuniary value of which led to their being payable directly to the court. At the time of Domesday Book the maxim held good, that only vassals (*taini*), who possess six *maneria* or less, should pay their *relevium* to the Vicecomes. Those possessing more than six *maneria* pay immediately into the Exchequer (at all events this principle is expressly mentioned in two counties). Do. 280, b. 298, b. (2)

(2) I shall refer again to the Norman Vicecomes in his character of military commissary in cap. 10. His special duties in furnishing garrisons for the Burgs arose from the fact, that the feudal service of forty days was insufficient for the purpose, and that paid standing garrisons were absolutely necessary. Hence the frequent payments for *milites* and *servientes*, for

horse soldiers and foot soldiers in the Burgs; and more frequently still in the campaigns. (*Dialogus de Sc. Madox*, ii. 422; *Madox*, i. 220, 370, etc. where a disbursement of £1228 is mentioned.) The Vicecomes as judiciary is again referred to in cap. 11, and his position as police magistrate in cap. 12. The mention made of his police functions in the legal books of

To deal with the numerous financial and judicial duties, an official system became early established, with its clerks (*clerici*), in whom we recognize the ancestors of our under-sheriffs. The sheriff charges his under-bailiff with the duty of collecting the dues and rents, with distrainments and summonses in the several districts (*Ballivi Hundredorum*); and further appoints working officials called "bailiffs" or "*servientes*" to attend on him and act as messengers, and also travelling under-officials or bailiffs errant. Altogether the financial position of the sheriff between the Treasury and those from whom payment was exacted, became soon so complicated, that (as in many German states of the middle ages) a "farming" of the office of sheriff arose, with a view of turning the uncertain revenue into a fixed state income. Certainly there are to be found among the sheriffs both farmers (*fermors*) and administrators (*custodes*); the difference between whom consists in the manner in which they render their accounts. But "farming" becomes the rule, and in many reigns can be proved to have prevailed in nearly every county. The appointment was sometimes for a quarter, or for half a year, but generally for a year—not unfrequently too for a number of years; but yet always reckoned from year to year, and revocable at the pleasure of the King. The rent is frequently the same that the predecessor paid (*antient ferm*), or the old sum with an additional payment (*increment*). The Exchequer accounts show that a formal rivalry in bidding took place. Once, for instance, the Chancellor, the Bishop of Ely, bids for the counties of York, Lincoln, and Northampton, 1500 silver marks down, with 100 marks additional in subsequent payment; whilst the Archbishop of York bids for York alone, 3000 silver marks down, with 100 marks additional payment.

The farmer-general had at the same time to produce respectable men to the Treasury, as sureties for the rendering of an account that was now strictly controlled. Twice a year, at Easter and Michaelmas, the sheriff appears in person before the Treasury. These are the two *scaccaria*, meaning terms for payment, which were previously announced to all the Crown debtors in the county. At every term a proportion of the rent, and other sums due, "*summonces*," have to be paid down as a provisional payment ("*profer*"); then with the presentation of the receipts follows the "*visus compoti*;" and in conclusion the "*summa*." Often, special

this period is precisely the same as that of the *Shir-gerefa* in the Anglo-Saxon period, e.g. in regard to the peace that he had to proclaim, Hen. 79, sec. iv.; as to summonses, Hen. 41, sec. v.; to distrainments, Hen. 6. 51; sec.

iv.; complaints relating to theft, Hen. 66, sec. ix.

The *leges Wilhelmi* especially confirm the old police functions of the *Shir-gerefa*. I shall refer at length to his financial duties in chap. 13.

commissioners were deputed to investigate the conduct of sheriffs who had exacted payments without giving receipts, or had committed other irregularities. (2<sup>a</sup>)

The collective office of the sheriff, as war commissary, summoning the lords and knights; as treasurer, through whose purse the finances of a small province pass; as police magistrate, having to execute judgments and maintain the King's peace against the mightiest in the land, clearly shows that, according to the notions of those times, only a Crown vassal or a skilled ecclesiastic was capable of administering such an office. The Norman lords despised no positions of gain. Hence we find at times kings' sons among the sheriffs (for instance, Richard, the son of Henry III.); the great justiciaries of the realm, and other high Court officials; the Archbishops of Canterbury and York; numerous Bishops; and sometimes even a highly placed Royal Chaplain; but most frequently the names of Norman lords occur, to whom the office of sheriff afforded a lucrative income in addition to their landed property. Yet the system varied under different reigns. Careless monarchs allowed the magnates to seize the sheriff's office; in a few cases the office was even allowed to become hereditary, although the personal responsibility was retained. But it was not until the reign of Henry II. that the office became systematically filled from the ranks of the newly formed official gentry; in the last years of this reign it was filled from the same class of officials as the barons of the Treasury and the travelling commissaries. In spite of the important position it afforded, the office remained

(2<sup>a</sup>) With regard to the rendering of accounts by the Vicecomes, the "Dialogus de Scaccario," ii. c. 1, 2, 4 (Madox, ii. 407-16), gives the systematic principles obtaining in the time of Henry II. The writ of summons to present accounts runs: "*Vide sicut te ipsum et omnia tua diligis, quod sis ad scaccarium ibi vel ibi, in crastino Sancti Michaelis, et habeas ibi tecum quidquid debes de vetere firma vel nova, et nominatim hæc debita subscripta.*" Then follow the several items. Under certain circumstances it is expressed in sharper terms, "*alioquin sic te castigabimus, quod poena tua aliis Ballivis nostris dabitur in exemplum.*" (Madox, i. 356.) Representation in delivering accounts is only allowed by special royal mandates, in later times by special permission of the president. It was imperative that at least one *miles* should be amongst the substitutes, and not only "*clerici*," "*quia, non decet eos pro pecunia vel ratiociniis com-*

*prehendi.*" (Madox, ii. 415.) In cases where the person from whom the accounts are due is a vassal of the Crown, short process is made, with distraint on his fief or personal arrest, but a *miles* is to be kept in decent imprisonment. An administration of the whole office by substitutes can only be allowed by special Royal licence. In the Rotuli 5 John a "*subvicecomes pro cancellario*" is met with in this office. But other considerations are also entertained with regard to money payments. In 12 John the men of the county of Dorset and Somerset pay 1200 marks in silver, "*quod Rex constituit eis Vicecomitem de se ipsis talem, qui residens sit in comitatibus illis, excepto W. Brieverre et suis,*" etc. An objection of this kind to certain persons as sheriffs is not unfrequent. In this way the first separate cases occur, in which an election by the county of their sheriff is allowed in return for a money payment.

at all times a purely personal one, dependent entirely upon the will of the King, and therefore revocable. The King had accordingly the power of separating from it several branches. Thus we meet in early times with special "foresters," "customers," "escheaters," "farmers" of towns, guilds, etc., and in later times special collectors of the *tallagia* of the fifteenths and other subsidies. The King had also the right to commit his burghs to the care of special burgh-bailiffs, with or without a judicial and financial jurisdiction within the burgh-district. He could also divide the judicial authority in certain districts, and grant exemptions to towns, etc.; all these special administrative branches the sheriff must support with his authority, whenever distrains and executions are to be put in force. The King could also introduce modifications into the conduct of the office; for example, by permitting the controlling power in extraordinary cases to be exercised by substitutes (*e.g.* for clergy in military matters). And he could finally on this account depose the sheriffs, singly or collectively, a popular measure repeatedly resorted to in the twelfth and thirteenth centuries. He might suspend them at any time from office, place *custodes* over them, investigate their conduct by commissioners, regulate their behaviour by instructions, and impress their duty upon them by new oaths of office. As in the Anglo-Saxon period, there cannot be found any trace of a right to the office, or of a right of the county assembly to appoint to it, nor of an appointment by election. (2<sup>b</sup>)

III. The Local Government of the Sub-districts within the county is still principally regulated by the nature of real property in just the same manner as under the Anglo-Saxon *geréfa* system. Through the Conquest and the feudal system arose a change of occupiers of the soil, and with the change in persons a new grouping of possessions; but the old system of property was in the main retained. The descriptions of the estates in Domesday Book reproduce the modes exist-

(2<sup>b</sup>) Of the personally high position of the sheriff numerous instances are given by Madox. In the "Dialogus," ii. c. 4 (Madox, ii. 417), it is, however, expressly stated that the Vicecomes need not be a vassal of the Crown. In later times the official instructions of the Vicecomes are numerous; for instance, in 42 Hen. III., an universal oath of office is prescribed, which throws much light upon the spirit of the administration. The sheriffs must swear that they will impartially and promptly grant justice to the poor as to the rich man; that they will accept nothing personally or through others,

except food and drink for a single day; not to quarter themselves on any one with more than six horses; to lodge with none who is worth less than £40 income from real estate, and not more frequently than once a year or twice at most, if invited, and then without making a precedent of it; to take no present exceeding twelve pence; not to take more servants with them than necessary for their safety on circuit; to see that these servants do not overburden the land by eating and drinking, or take from any inhabitant sheep, corn, wool, movable goods, money, or money's worth. (Madox, ii. 147.)

ing at the close of the Anglo-Saxon period, under the partly new names of "manors," "honors," and "burghs."

1. The *manor*, "*manerium*" or lord's seat, is identical with the "*mansus*" of the Anglo-Saxon period, comprehending the ceorls and dependants who had settled round about it, who for the most part form a union of neighbours, *villa*, *villata*. Under the new tenure, the real rights of landed property have not changed their nature as fiefs. The newly enfeoffed Norman, alike with the Saxon Thane who remained in possession, exercises the usufructuary rights of his predecessor, that is, collects the customary dues through the managers of his estates, *præpositi villæ*, reeves, bailiffs, or stewards. In the system of police-sureties the *villa* forms a lord's tithing, where it contains ten or more families. The landowner claims the customary jurisdiction over his people, together with the extensions of it that have taken place by grant, all of which are enumerated in the deeds of grant under the denominations "saca," "soca," "infangtheft," and "outfangtheft." It was merely a new name when this was now called, in the language of the Norman lords, a "manor," a name which first appeared with other Norman fashions under Eadward the Confessor. The majority of the manors were now in the hands of Crown vassals; a considerable number also former Saxon Thanes. (Ellis i. 90.) The Norman Government endeavoured to reduce all these judiciary powers to one uniform system, but certainly not to extend them (*vide* chap. x.). The Domesday Book, indeed, shows a number of new manors which had been created by division, but in the year 1290 the statute "*Quia Emptores*" put an end for ever to the creation of new manors. (a)

2. The formation of lordships (Honors) also reaches back into the Anglo-Saxon period, originating in a group of estates lying close together, over which, in the system of police-sureties, the stewards (*præpositi*) of several lords presided—to which lordships were often given a "saca et soca" in an extended measure, and which were in certain matters co-ordinated with the hundreds. The successors of the Saxon great Thanes are now Norman lords, who, following the fashion prevailing in their old home, strove to form exclusive

(a) Touching the manors the Glossarium of Sumner says as follows: "*ante Normannorum tempora vox apud nos, in chartis aut aliis nostris bonæ fidei monumentis, frustra queritur. A Normanniæ (inter alia ejus farinæ verba) e Gallia huc adductum conjicito, quorum in Anglia præcessoribus Hida, Familia, Villa, Sulinga, Casata, Mansura, Manens (ut Mansus, Mansio,*

*Mansum, Colonia, et cæcæ, et exteris simul) idem significarunt, ac ipsis et aliis posterioris ævi populis Manerium.*" (Ellis, i. 224, 225.) As to the technical meaning of the words "saca," "soca," "infangtheof," "team," "toll" in the deeds of enfeoffment, see the treatise of Zöpfl, "Alterthümer des Deutschen Rechts" (Leipzig, 1860), i. pp. 170–211.

feudal lordships out of these unions. We find in England round certain magnates a small court, a steward (*dapifer*), a butler (*pincerna*), a marshal, a chamberlain, etc.—their offices being sometimes even hereditary. The numerous *venatores*, and half a hundred other classes of higher and lower servants mentioned in Domesday Book, point to the fact that inferior vassals of the Crown also imitated this custom. The Normans, fond of pomp, herein vied with the princes of the Continent. But the Conqueror had taken care to assign their possessions to the greatest feudatories in so many counties, that their estate in each county did not differ greatly from that of the inferior vassals of the Crown. They were not able, either locally or temporarily, to consolidate themselves, since the strict law of escheat often brought the same possession back to the Crown several times in a single century. And then the interest of the financial administration pre-eminently kept these greater formations within limits, and, where a favourable opportunity offered, endeavoured to suppress them. The principal seat of the lord, the "*caput baroniæ*" of later times, might indeed be a meeting-place of the under-vassals for festivities, investitures, legal business, and the holding of manorial court days, but it was not a superior feudal court in the French style. The Norman manors are rather mere unions of estates, which are all granted, transferred, and administered alike, but have not specific sovereign rights attached to them. After the frequent escheats the "honors" which had thus fallen in were often re-granted, diminished in extent, so that later Treasury accounts distinguish expressly between lordships of old and of new tenure. Finally, the prohibition to create new manors also prevented the formation of new honors. (b)

3. *The Norman Burghs* are in like manner a continuation of the special parochial and judicial districts, which had been formed, in the Anglo-Saxon period, around a fortified building or a castle. Many were severely dealt with and laid waste at the time of the Norman Conquest. William I. took them over with their legal constitution, and incorporated the more important of them immediately with the royal demesnes.

(b) The appellation "honor" is also merely a new name for an old institution. Heywood, pp. 188, 189, rightly points out that, where in Domesday Book the word "honor" is in certain cases met with, it is used alike for the land and for the fief of ordinary vassals. It was not until later times that it was used in preference for the great fiefs: "*Possessiones magnas, quas vulgo vocant honores.*" (Henry Huntingdon, "*De Contemptu Mundi*," c. 23.)

Probably the expression became a technical one in the Treasury. So far as I can discover, the name "honor" is used in the Treasury accounts after the time of Henry II. for the great possessions of earls, of the High Constable, and of some few great vassals. The collection of laws, which was made about the same time, that of the Leges Henrici I., certainly uses the word for those possessions, to which several *maneria* belong. (H. c. 55.)

A list of them, about eighty in all, is given by Ellis (i. 190). A number of such places, which already in the Roman times had been *civitates*, continued to be called "cities," which name, however, has no reference to their constitution. In the county system they often form a hundred, and sometimes form several, as where an old and a new town are united together. Like the counties generally, the royal cities, burghs, and towns were treated as special estates, and either incorporated with the *corpus comitatus* or given over at the royal pleasure to special "Fermors" or particular town bailiffs, *custodes*, provosts, etc. The Empress Matilda, for instance, farms out London for £300 rent to Geoffrey of Essex. Where in greater cities several special guilds existed, these again might be the subject of under-leases. For example, in 5 Henry II. the Weavers of London pay five marks in gold as rent for their guild for two years; the Bakers one mark and six ounces in gold; in 11 Henry II., the Weavers twelve pounds silver, and the Bakers six pounds silver "*pro gilda sua*;" and in like manner the guilds in Oxford and in other places. It will be shown later on how the feudal system began to compel the real estates not subject to the feudal military service, to periodical contributions in cases where the honour and the needs of the feudal lords required it. Under the name of "*tallagium*" a taxation of this kind was imposed according to necessity, and as a rule only repeated at several years' interval. It was raised either from individuals or in gross; in the latter case the households bound to contribute agreed together, in their common pressing interest, how it should be raised. Frequently already existing guilds of merchants, tradesmen, and house or land owners undertook this duty of raising the *tallagium* in consideration of especial privileges. But it was still simpler when, instead of the sheriff, whose accounts had without this become complicated enough, the "men of the burgh" themselves undertook to farm it. The King then demands his "taille" from the body of citizens, or from a smaller guild which has undertaken the duty, but no longer from the individual, whose possessions in this manner become again tax-free. In this case a fit and proper person is presented to the Treasury, who, on being appointed "town-reeve," undertakes with sureties the responsibility for the due payment of the rent agreed on, and collects from the individual the dues and imposts. The official thus appointed is known throughout by the title of "reeve," or "bailiff," in later times also by the Norman name of "mayor." For some time an eager competition took place between the citizens and the Vicecomes or some other lord anxious to outbid them. In process of time, however, the



majority of the towns farm themselves, "*firma burgi*," "fee farm," and thus gain the first step towards their independence. By a charter of Henry I. even the sheriff's office for the county of Middlesex is, according to this system, farmed out to the city of London, "*ad firmam pro CCC. libris ipsis et heredibus suis ita, quod ipsi cives ponent vicecomitem, quem voluerint de se ipsis*," etc. ("Select Charters," p. 108.)

Even in the Anglo-Saxon period the city of London, standing as it did in regard to population and extent of possessions, on an equality with a county, by annexing Middlesex, had gained for itself the position of a county. Its "wards" may be compared with the hundreds. On the accession of Richard Cœur-de-Lion to the throne, instead of the portreeve, two bailiffs appear as town-reeves, and soon after this a mayor, whose free election (nomination) was granted to the citizens by charter (10 John). After Richard I.'s reign more extended privileges for other cities spring up, such as privilege of market, new guilds, a separate jurisdiction, and free election of their own officials. From the *firma burgi* connected with a separate jurisdiction, proceeds the English municipal law, which at the close of this period stands before us developed in clear outlines, but which only presents a number of immunities with no special participation in the general government of the county.

The separate government of the burghs was in the Anglo-Saxon period especially seen in the case of the royal demesnes. Besides these appear also the mediate towns as a part of the possessions of the great feudatories, though certainly in small numbers and of small extent, in which the lord of the soil collected for his own benefit the customary rents and dues, and held his court. The burden of contributing according to the needs of the lord attached also to the persons of the inhabitants, and occasionally comes to light whenever, in consequence of escheat or feudal guardianship, such places temporarily pass "into the King's hand," and are so entered on the Treasury rolls. This right of levying contributions became, as everywhere, a cause of oppression, grievance, and disturbance. How it was exercised by the Norman lords we may judge from the fact that the towns frequently disputed the lords' right, and declared themselves liable to pay contribution only to the King. For this reason the King appears early to have protected these places against ill-usage. The very frequent mention of a special royal licence points to a general control exercised by the Treasury over these *tallagia*. When lordships escheated, as so frequently happened, the reservation was always made in

the new grant of them "that such places should only pay *tallagia* when the King taxed his own" (Madox, i. 756). What after this still remained of the lords' right of levying contributions, finally disappeared generally through purchase. (c)

It is beyond doubt the finance administration which has before all else influenced the form of local government. In the interest of a uniform financial control the royal manors and the groups of estates were now left to the administration of the *Shir-gerêfa* in a still greater measure than in the Anglo-Saxon period, so that manors and honors pre-eminently appear as lordships in the possession of private landlords. In the burghs, on the other hand, which were a bounteous spring for the replenishment of the royal exchequer, a royal special government prevailed, and was constantly endeavouring to form independent communities in consideration of heavy money payments.

(c) As to the Norman burghs and the gradual origin of municipal law out of the fusion of the modes of taxation of the *firma burgi* with the grant of a police jurisdiction (court leet), see in detail Gneist, "Geschichte des Selbst-government," pp. 104-112, and Stubbs, i. cap. 11, sec. 131. Relying upon the great mass of records contained in Merewether & Stephen, "History of the Boroughs," 3 vols., 1853, I differ in some particulars from Stubbs, and hold to the view, that the basis of the municipal law is the grant of a separate municipal court, and that the right of citizenship is hence normally extended to all resident citizens, who share in bearing the burden of office, and paying the municipal taxes, "resident householders, paying scot, bearing lot." The favourite modern idea, of making political creations proceed from groups of social interests, has given an exaggerated importance to the guild system of the English towns. The so-called "*judicia civitatis Londoniæ*," as also the guilds at Cambridge, Canterbury, Exeter, and elsewhere, are voluntary unions with certain limited ends and objects in

view, which have often an importance at the first origin of the *firma burgi*. The Municipal Court of Justice (the court leet) on the other hand, with its legal procedure, could not be limited to, or based upon, a private guild. That the mediate towns are a comparatively inferior creation, is proved by the rare mention of them, the insignificance of the places mentioned as such, and the small number of the baronial charters, when compared with 1500 royal charters, upon which is based the formation of the English municipal law.

In harmony with my deductions Stubbs says (iii. 559): "In 1216 the most advanced among the English towns had succeeded in obtaining, by their respective charters, and with local differences, the right of holding and taking the profits of their own courts under their elected officers, the exclusion of the sheriff from judicial work within their boundaries, the right of collecting and compounding for their own payments to the Crown, the right of electing their own bailiffs, and in some instances of electing a mayor."

## CHAPTER X.

## I. The Development of the Norman Military Power.

UPON the basis of the county government we have just depicted there ensued a change in the powers of the Crown, which shows with startling rapidity the material sovereign rights of the more modern polity. Primarily it is the military power which, under the influence of the Norman feudal system, presents new features in every direction. Once the weakest point in the Anglo-Saxon political system, it has now become one of the firmest bases of the Norman.

1. *The decision as to war and peace* was at the close of the Anglo-Saxon period still frequently made by the Witenagemote, and claimed by it as a right whenever extraordinary services were required of the national militia. The limits of this right were, however, not sharply defined; it was at all events an established principle that the King could claim the right of personally summoning his own Thanes. This last-named right was now the universal one, since every vassal of the Crown and every under-vassal had become the King's *homo*. The military oath of fealty is now taken to the King's person, and holds good for his possessions abroad, "*extra regnum*" as is laid down in the *Charta*, Will. I. 8, c. 2: "*Statuimus ut omnis liber homo fœdere et sacramento affirmet quod intra et extra Angliam Willelmo regi fideles esse volunt, terras et honores illius, etc., defendere.*" ("Select Charters," pp. 88, 84.) This charter has, indeed, been enlarged with spurious additions by a later hand, but it is probably genuine in substance. In any case feudal service *extra regnum* was enforced by all the Norman kings, and it was not until after the separation of Normandy from the English crown in John's time that cases of direct refusal occur. The Norman was obliged, in the interest of his own possessions, as well as in that of his countrymen in Normandy, and as a condition of his new possessions on English soil, to acquiesce in the condition imposed, that of serving the King "*intra et extra regnum.*" The Anglo-Saxon Thane had to be content if he retained his possessions on similar terms.

This was certainly the hardest requirement of the new

order of things, and one that met with a strong opposition from the vassals. This fact explains the events fraught with such important consequences at the close of William I.'s reign. When in the year 1085 an invasion of the Danes was seriously threatened, the King, by means of a land-tax, brought together a huge paid army of different nationalities, and by heavy taxation and quartering of his soldiers suppressed the opposition that was still offered him. In the following year all the greater landed proprietors appeared willingly at the review held near Salisbury to acknowledge by one great act of homage, that all Crown and under-vassals were now the King's "men." And this act proclaimed that the newly formed feudal militia was no popular muster, but an army to be summoned by the King. At the same time the royal prerogative of deciding the question of war and peace was established for all time. As an extension of this, the right of building castles was distinctly recognized as a royal privilege. The "*castellatio sine licentia*" is from that time forward an offence threatened with the "*misericordia regis*" and severe penalties (Hen. I. 13, sec. 1; 10, sec. 1), and use was made of it in such an extensive manner that William's reign marked a decisive epoch in the defences of the British Isle. (1)

(1) For the Norman military system as a whole, cf. Gneist, "*Geschichte des Selbst-government*," pp. 61-68. Some useful matter is also contained in Grose's "*Military Antiquities*." See also remarks in the "*British Military Biography*" (2nd edition, 1846). The innovations are the strict personal service based on property, the uniform apportionment according to free possession of real property, and the complete enforcement of obedience, by the punishments for felony, and feudal penalties. This strict martial law was introduced from Normandy. It is true there did not exist a military code which could have produced a written Norman feudal law. But the feudal system had already become defined in its details by the regulations of the dukes, and by an early established legal and financial administration. And in Normandy, too, proceeding doubtless from the hierarchy of the feudal system, and from the position of a conquering tribe, a class-privilege had become developed in outline. The Franco-Norman feudal constitution of those times was based upon the seignorial idea, which made the great feudatory into an hereditary *Seigneur* over

his under-vassals, and which in after-times, favoured by the influence of possession and similar interests, easily made this bond a stronger one than that which bound the under-vassals to their suzerain. In England an opposite condition of things existed. The possession of the Norman lords was a new one; the nationality and the interests of their Saxon under-vassals were opposed to theirs, and even their Norman *homines* were in the main collected from all parts. The Seignorial idea could not accordingly firmly establish itself here. The fortified places the Conqueror carefully reserved to himself. As the Conqueror advanced the first care of the Conqueror was the building of a fortress in the conquered town. The exclusive royal right of fortifying castles, though doubtful in the Anglo-Saxon, is certain in the Norman period. Of the forty-nine castles mentioned in Domesday Book, only that of Arundel is described as existing "*tempore Edwardi*." The castles of Dover, Nottingham, Durham, and the White Tower in the Tower of London, in existence at that time, are not mentioned. This number of strong fortifications

2. The *equipment* of the soldiery and the *apportionment* of the *contingents* was in Anglo-Saxon times the subject of transactions between the sheriff and the county assembly. These transactions now assume a different form. The Domesday Book laid the basis of a roll of the Crown vassals. According to the extent and the nature of the productive property it could be computed how many shields were to be furnished by each estate, according to the gradually fixed proportion of a £20 ground rent. The burden of performance was laid in the first instance on the landed property of the Crown vassal. But since Domesday Book was drawn up, subinfeudation had increased, and the actual burden of performance was thus partly transferred to the enfeoffed under-vassal. The manifold subinfeudations, changes of possession, forfeitures, and divisions, were proved by the charters and writs preserved at court, by means of which the rolls were made to correspond with the actual state of affairs. But, in consequence of the numerous disputed cases and varying conditions, a permanent roll of tenures was never drawn up; accordingly, the number of shields to be furnished was never officially determined. As far as we may conjecture by reference to later statements, the number of shields may be fixed at about 30,000.\*

But the Vicecomites were doubtless in possession of the official treasury lists for their county. There was therefore only now needed a personal order of the King issued to the Crown vassals, and at the same time to the under-vassals, who for the purposes of the summons to arms are also "*homines regis*." But since the duty of furnishing, equipping, and provisioning the troops belonged to separate estates, this business had to be undertaken by the government of the county. It was impossible to issue thousands of personal orders directly to the individual vassals, nor were the great feudatories the right persons to be addressed, as their possessions, and with them their under-vassals and horsemen, lay scattered about in many counties. According to the rolls in Domesday Book, the estates of about 190 secular vassals of the Crown were situated in from two to five counties;

with, for the most part, standing garrisons, certainly exercised a severe pressure upon the adjacent country. The remembrance of the Norman "castle-men" remained throughout the whole of the Middle Ages.

\* See above, p. 130 note, the statement of Segrave under Henry III. In the *liber niger*, the number of knights who could be furnished by the vassals of the Crown in the ten counties

south of the Thames, is given at only 2047, and these counties apparently contained a fourth of the whole population. The official computation, according to which the scutage at the end of the thirteenth century was calculated, is based upon an estimate of 32,000 knights' fees; but the amount of money really raised fell far short of this estimate (Stubbs, i. 432).

those of twenty-nine lords in six to ten ; those of twelve great lords even in ten to twenty-one counties, and the possessions of the great ecclesiastical vassals of the Crown were distributed similarly to these (thirty in two counties ; about thirty in three counties ; about six in from three to eleven counties). The procedure consisted in a mobilization order addressed to the Vicecomites, and couched in the following form : "*Vicecomiti Kancie salutem. Præcipimus tibi quod sine dilatione summoneri facias per totam ballivam tuam Archiepiscopos, Episcopos, Abbates, Priores, Comites, Barones, Milites, et libere tenentes, et omnes alios qui servitium nobis debent sive servitium militare vel serjantiæ: quodque similiter clamari facias per totam ballivam tuam, quod sint apud Wigorniam in crastino S. Trinitatis anno regni nostri septimo, omni dilatione et occasione postpositis, cum toto hujusmodi servitio quod nobis debent, parati cum equis et armis eundem in servitium nostrum quo eis præceperimus. Eodem modo scribitur omnibus Vicecomitibus Angliæ.*" (Cl. 7 Hen. III. 3.)

The sheriffs then issued their proclamations to all burghs and market-towns, commanding the vassals to present themselves "at the risk of forfeiting their fees or of severe penalty according to the King's pleasure." In time of greater urgency, and out of courtesy, special commands could be issued in addition directed to the great Crown vassals and the prelates, and these commands were served by the Vicecomes. Every vassal of the Crown had to see that on his estates so many heavy-armed men were in readiness as according to the feudal list it fell to his lot to furnish. The preparations for equipment and provisioning had to be made beforehand on each separate estate, and it was the duty of the great feudatories in each county to make one of their under-vassals or household officers responsible for this. As the total number of the propertied Crown and under-vassals only supplied a portion of the shields required, the majority had to be furnished by the equipment of sons, relations, and free dependants (*servientes*, mounted servants). Since, moreover, the Norman army at all times needed not only cavalry but also masses of infantry, the vassals were readily content to furnish, instead of the superfluous horsemen, a corresponding number of archers or spearmen. The furnishing of contingents thus became much more a matter of detail, and had to be conducted according to the county-divisions. Neither at the time of equipment nor in the field, and perhaps not even at a review, could the soldiers of a great vassal have presented a fixed unity, and hence the vassal's position as hereditary captain (*senior, seigneur*) could not attain to the importance that it did on French soil. But all these trans-

actions were not matters on which the Thanes of the county were to be negotiated with as in the Anglo-Saxon period, but the vassal had to satisfy the royal officer that he had fulfilled the duties the feudal list imposed on him. (2)

3. The command over the collective feudal army belongs, as a matter of right, to the King, as was the case in the Anglo-Saxon period. All actual leaderships are based upon his personal commission. According to the cavalry system of the feudal militia, the collected troops keep their own "*comes stabuli*" and their "*marescallus*," as at the present day their adjutant-general and quarter-master-general. The constable and marshal arrange the troops into divisions and companies, settle disputes as to precedence and field badges, in the field as in the tournament; keep the rolls of their men, and give certificates as to attendance, by which a proof is furnished to the Treasury respecting the feudal duty of each, showing whether it has been performed, bought off, or remitted. From these beginnings was developed a military jurisdiction derived from the King. But as every standing army strives to transfer to the civil community the military organization, the same was the case in a high degree with the feudal militia, service in which was based upon real estates. The more the vassallage began to feel their importance as a great war-guild and dominant class, the more urgent was their demand to have their constable and marshal for the whole feudal army when upon the peace footing, as the feudal militia in Normandy had long had its hereditary constable and marshal.

After long hesitation this point was conceded. Under

(2) As to the recruiting of the tenants see Grose, "Military Antiquities" (i. 65). Thomas, "Exchequer" (p. 53). The orders issued to the sheriffs calling upon them to summon the troops appear to be uniformly framed. (Madox, i. 653, 654.) Failure to appear is in the case of the higher clergy only punished with heavy fines (*amerciaments*) — for instance, with sums of 100 marks in silver; in the case of secular vassals deprivation of their estates appears to be the immediate consequence. (Madox, i. 662, 663.) In addition to the personal service of the Crown vassal, the prescribed number of heavy-armed troops had to be furnished, for whom the expression "*servientes*" becomes gradually the prevailing one. (Heywood, 129.) As a proof of the fulfilment of military duty, either a certificate from the commander-in-chief would

serve, or from the constable, the marshal, or one of his lieutenants deputed for this purpose, or the "*rotuli*" of the war office. (Madox, i. 656, 657.) Persons possessing a fraction of a knight's fee, do duty for a relatively short time; for instance, the half of a knight's fee is computed at twenty days each year. As early as in the twelfth century these sub-divisions extend so far as one-twentieth of a fee, in which case evidently only the honorary rights of the Crown vassal, and not his personal service, are concerned. That even clerics were sometimes summoned in person is proved by a writ (printed in Rymer), addressed to the bishops "*eo quo singuli, tam prelati quam alii in propriis personis venire debeant, ad defensionem coronæ et regni nostri*" (41 Hen. III.). As a rule it is only said that the prelates have to send "*militēs suos*."

Stephen, perhaps even somewhat earlier, a *constabularia* and a war marshalship appear established for the whole feudal army, endowed with certain distinctions and fees. Over the army in the field, however, the King reserved to himself the personal command, in addition to the right of appointing the commanding constable and marshal. The official system extended to the inferior commands, to which the names "*constabularia*" and "constable" were universally applied from the highest ranks down to the lowest. Certain limitations only were recognized in respect of the appointment, by the King, of men chosen from the ranks of the greater, middle, and inferior vassals. The maintenance of these limits was rendered necessary by the indispensable military retinue which accompanied the higher commanders, and not less by the *esprit de corps* which was rapidly developing among the feudal militia. The skilled service of the cavalry required the practice and training of years, if possible even from boyhood. The system of knighthood, with its admission to full honours, and with the degrees of knight, esquire, and page, was after the Crusades uniformly developed in England. The tournaments flourished under Stephen and Richard Cœur de Lion. From the obligation to full knight's service naturally arose the obligation to take up the dignity of a knight, and from time to time royal writs were issued to the Crown vassals, "*ut arma capiant et se milites fieri faciant, sicut tenementa sua quæ de nobis tenent diligunt*" (Rot. cl. 19 Hen. III.). (3)

Under the firm hand of a martial monarch this Norman feudal army presents an imposing picture, and comes into the foreground as the actual basis of the political and social system. With this military organization the Norman kings

(3) As to the command of the feudal militia, see below, cap. 16, "the great offices;" and the "Peerage Reports" (iii. 199b). Beginnings of the guild system and the "master's rank" in the cavalry are found already in the Anglo-Saxon period. (Turner, "History of the Anglo-Saxons," iii. 73-75.) In the Anglo-Saxon records, "Cniht" is a tolerably frequent term for the martial followers. Still, a single instance of the conferring of the knight's dignity is no proof of a military system or a privilege of rank formed from it.

Not until the time of the Crusades is a powerful influence upon military and social life acquired by the knightly order. As to the royal ordinances affecting the tournament under Richard Cœur-de-Lion, see "Lappenberg-Pauli" (iii. 280). This, moreover, as well as the custom of "dubbing the knight,"

is made a source of revenue. Out of the royal charters of the earlier Norman period, "*armis et equis se bene instruant*," the practice of the Treasury about the middle of Henry III.'s reign, deduced the maxim that every vassal, even the under-vassal, is as a *homo regis* bound to cause himself to be knighted at court, paying the fees for the dignity under a penalty for neglecting to do so. (Madox, i. 510.) Hence arose the curious circumstance that the taking up of the knight's dignity was regarded in England as a burdensome duty, and one which the majority endeavoured to escape, being contented with their dignity as "*scutarii*" (esquires) in the feudal scale of dignities, their maxim being "*sufficiens honor est homini, qui dignus honore est*" (Coke, "Inst.," i. 231, 233).



became, as none had been since the withdrawal of the Roman legions, lords of the whole land. This military force, assisted by the numerous and strong works of defence, dominates alike the western Britons and the northern neighbours, puts an end once for all to the Danish invasions, and turns England into a really united State, possessing in point of power the promise of a great future. In spite of all its outward pomp and personal bravery, this feudal army suffered from the defects inherent in all feudal militias—imperfection of discipline, tactics, supplies, and transport, and the want of weapons effective at long distances. It was also probably never collected together for important service, but was only employed in divisions and at long intervals in wars upon the Continent and border-wars, or to suppress isolated insurrections. But one thing was especially wanting in Anglo-Norman feudal soldiery, a characteristic feature of the feudal militia of the Continent—the “territorial” connection between the under-vassals and the great feudatories. This defect resulted not only from the scattered position of the great feudal estates, but still more from internal dissensions. For several generations the former Saxon Thane did but reluctant service as an under-vassal to the Norman lord who had been forced upon him. And with the majority of the Norman under-vassals the case was no better, they being a collection of Frankish horsemen and farmers, who now figured on English soil as lords, “rude upstarts, almost crazed by their sudden promotion, marvelling how they had attained to such a position of influence, and thinking they could do as they liked” (Ordericus, iv. c. 8). Real loyalty between the small and great vassals was thus, in the early Norman days, almost impossible; and with the decay of the royal authority under the usurper Stephen, the small vassallage broke up into a violent irregular soldiery. The military state still lacked national unity.

These weaknesses of the feudal militia, and the ever-recurring conspiracies of the great vassals, caused the revival of the old Saxon national militia more than a hundred years after the Conquest. Disunion in the royal family itself, the influence of the Crusades, the evil example of Normandy and France, and the dissensions with the Church, at that time all combined to make the feudal array an untrustworthy force, against which the King himself sought for some counterpoise. In accordance with the established principle of the Norman crown, the old right of summoning the national defence (*fyrð*) had never been abandoned. This force was once called together by William Rufus, although primarily only for the purpose of extortion. (Huntingdon, a. 5, Will. II.) In the

North Country the national militia, under Archbishop Thurstan, had won the battle of the Standard against the Scotch, and again in 1178 the popular army of Yorkshire, under the command of the faithful barons, had warded off the Scotch invasion. This was followed (1181) by the new legal ordinance of the Assize-of-Arms (27 Henry II.), which contained the following provisions. Each owner of a knight's fee (not merely as tenant, but by virtue of the universal duty of the community) is to possess a suit of iron armour, a helmet, a shield, and an iron lance, and moreover every knight is to have as many suits of armour as he has knights' fees. Every secular freeholder, possessing in movables or rents sixteen marks, shall in like manner possess a suit of armour, helmet, shield, and lance. Every freeholder of ten marks in goods or income shall have a breastplate without arm-pieces, an iron helmet, and a lance. All burghers and other freeholders shall have a stuffed jerkin and iron helmet, and a lance. Each shall swear the oath of allegiance, and that he will keep these weapons for service at the King's command, and in loyalty towards him. These weapons may not be sold or pledged. In the hundreds and hamlets district-commissions (consisting of men possessing not less than sixteen marks rent in land, or ten marks in movable property) are to be appointed, to assess property for the land army. Royal Commissioners are on their journeys to make lists of the names of those bound to this duty, and to swear them in to obey the royal "assize." Freemen only are mentioned, and it is expressly laid down that only freemen shall be permitted to take the military oath. Apparently officers (constables) had already been appointed in the several hundreds for this militia, which was a force not dependent on feudal tenure.

With the general summons of the *liberi homines* thus established—the national army revived on a new legal basis—there could also be combined the summons of the feudal militia, as was actually done in a case of great war-peril in the year 1217. ("Select Charters," 343.)

In another direction also, at about the same time, the national influence of the insular position of the country, the climate, and the mode of life made itself felt among a portion of the feudal tenants. The conquering race had long felt itself secure in its possessions. For more distant warlike expeditions upon the Continent a uniform levying of English feudal forces appeared neither equitable nor, in consequence of the short time of service, feasible. Hence, from the time of Henry II., remissions of feudal service began to be purchased. Varying at first, by degrees a scale for this so-called scutage

(*scutagia*) became fixed; and thus the feudal military system enters into the province of the financial control (see cap. 14), as the basis of a new system of taxation.†

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## CHAPTER XI.

### II. The Development of the Norman Judicial Power.

THE judicial system, as the most permanent part of all political organizations, was least affected by change in the transition to the Norman period. Immediately after the first preliminary settlement of affairs, William solemnly bound himself in the fourth year of his reign, "to maintain the good and well-tried laws of Eadward the Confessor," merely excepting certain changes that had become necessary. (Sax. Chron. A.D. 1070.) It is said that he appointed twelve men versed in the law to make a collection of all such laws and customs as were in use in the time of the Saxon Kings. The Saxon population clung to that promise out of affection for their national system of law, and with all the more jealousy, because it afforded a guarantee of personal freedom against the tyranny and violence of the Conqueror and his followers. In all historically authenticated cases it is apparent that William acknowledged the ancient judicial system; that he wished to do justice, and that he perceived therein a means of maintaining and consolidating his new kingdom. From the time of Henry I. that promise is periodically repeated. In the meaning and language of the time, it was understood to

† The origin of "scutage" in satisfaction of military service after the reign of Henry II. is carefully given by Madox (i. 625 *et seq.* and 642 *et seq.*). (See below, cap. 13, sec. vi.) In the second year of Henry II., for the first time, the Prelates were, on the occasion of a campaign against Wales, allowed to pay twenty *solidi* on each knight's fee instead of furnishing a horseman.

In 5 Henry II. the secular vassals also obtain permission to pay two marks for each shield instead of doing service. From this time a satisfaction of feudal service by *scutagia* becomes more frequent. Where small sums were demanded, the commutation appeared as a favour, which for a long

time was not forced on the recipients. But later, when the taxes were fixed at a higher rate, and the demand for scutage was more frequently made, the time of Magna Charta drew near, when the King was obliged to consent to negotiate with his Crown vassals on the subject of assessing the *scutagia*. Different from this, and occurring both earlier and later, was the admission of a substitute in cases of special hindrance, as to which a money payment (*fine*) was mutually agreed on in each individual case, under the heading, "*ne transirent, pro remanendo ab exercitu, ne abeat cum rege,*" etc. (Madox, i. 657, 658).

embrace the "*lex terræ*," that is, the whole legal system, including criminal as well as civil law, procedure as well as positive law. The promise meant: "Right shall be spoken by the same persons, and for the same persons, and according to the same forms and principles as in the Anglo-Saxon days." \*

Justice is accordingly dealt out by the same persons; that is, the Norman Vicecomes, as Justiciary, steps into the place of the Saxon Shir-gerêfa, and periodically holds the customary courts in the county and hundred. The jurors are, as in the Saxon days, the freeholders of the county.

A decree of Henry I. (Charters, 108) confirms this with a royal reservation. "*Sciatis quod concedo et præcipio, ut a modo comitatus mei et hundredo in illis locis et iisdem terminis sedeant, sicut sederunt in tempore regis Edwardi, et non aliter. Et si amodo exurgat placitum de divisione terrarum, si est inter barones meos dominicos, tractetur placitum in curia mea. Et si est inter vassallos duorum dominorum, tractetur in comitatu. Et hoc duello fiat, nisi in eis remanserit. Et volo et præcipio, ut omnes de comitatu eant ad comitatus et hundreda, sicut fecerunt in tempore regis Edwardi.*"

The collection of laws known as the *Leges Henrici Primi*, repeatedly represents the county courts as assemblies similarly composed to those of ancient times. Formerly the Hundred Court was composed of freeholders, but in the County Court the Thanes were the regular judges, and the ordinary freemen only participated as assistant judges, or as mere bystanders. In the place of the Thanes stand now the Crowns and under-vassals and the greater freeholders in their capacity of free landowners. The customary legal system makes them therefore judges: "*Regis iudices sunt barones comitatus, qui liberas in eis terras habent; villani vero vel cocseti, vel qui sunt hujusmodi viles et inopes personæ, non sunt inter iudices numerandi*" (Hen. I. c. 29). \*\*

\* As to the consecutive history of the Anglo-Norman judicial system, Dugdale's treatise, "*Origines Juridicales*," contains only antiquarian matter. Equally perplexing are the scattered remarks in Spelman's "*Glossarium*." More to the point, but often hazardous, is the sketch in Spence's "*Equitable Jurisdiction*," vol. i. pp. 99-127. A better treatment of the subject begins with Edward Foss's work, "*The Judges of England*" (London, 1848-64, 9 vols. 8vo). The merits of the German treatise by Biener, "*Das Englische Geschwornen-Gericht*," 1852, 1855, 3 vols., and the

treatises of Brunner, Gundermann, and others are very great. It is now well established that King Edward never published a special code of laws, but that by the "*Leges Edwardi*" is meant the customary law of the country at the close of the Anglo-Saxon period. This is proved by the expression of William of Malmesbury (*Gest. Reg. ii. 11*), "*non quod ille statuerit, sed quod observaverit.*"

\*\* Hence we have at first the old composition of the Hundred Court with its freeholders, the County Court with its Thanes, in whose place now stand hardly more than four hundred

The same actions are now heard before the Norman Vicecomes as were formerly heard by the Saxon Eorl and Shirgerêfa: "*omnis causa terminetur in comitatu vel hundredo vel halimoto sacam habentium*" (Hen. I. c. 9, sec. 4). In like manner the regulations touching suit of court, show that the County Court is to be the proper court for the highest as well as the lowest classes: "*Intersint autem episcopi, comites, vicedomini, vicarii, centenarii, aldermanni, præfecti, præpositi, barones, valvasores, tungrevii et cæteri terrarum domini diligenter intendentes*" (Hen. I. c. 7, sec. 2). The duty of the vassals to do suit of court (*secta*) was a feudal duty, and a Saxon custom at the same time; but representation was early recognized: "*si dapifer ejus legitime fuerit; si uterque necessario desit, præpositus, et sacerdos, et quatuor de melioribus villæ adsint pro omnibus, qui nominatim non erunt ad placitum submoniti*" (Leges Hen. I. c. I. cit. sec. 7).

The procedure of the tribunals which the Saxon freeholder here sought, was the ancient one, with the Saxon writ of summons, outlawry, security, compurgators, and trial by ordeal. The Norman, on the other hand, preferred a procedure which, furnished with formal pleadings, generally appealed to the duel as *ultima ratio*. The rule of law which was needed to decide between the two systems had to be determined by royal direction. One chief point, the proof, the Conqueror had already settled according to a *jus æquum* (Carta Will. c. 6; Charters, 84). But this was, after all, only a chief point. Moreover, a trial which took place with judges, lawmen, suitors, and compurgators, each of whom claimed their customary law, whilst no party so much as understood the language of the other, was sure to cause for a long time a terrible confusion, in which partiality and corruption were not wanting. At all events, in this mixed law, we find an arbitrariness on the part of the magistrates both in procedure, proof, and judgment; and a venality

Crown vassals and the *subtenentes* of Domesday Book. A limitation to Crown vassals alone, which has been often asserted, is perfectly untenable: no Hundred Court, and not many County Courts, could have been sufficiently composed of the existing number of the *tenentes in capite*. The *subtenentes* of the Domesday Book are only to a small extent invested subvassals, but they were beyond all doubt *libere tenentes*, according to the meaning of the Anglo-Saxon constitution. The degrees in the feudal régime came into consideration in the legal system only in one special point, that

no under-vassal shall be a judge in a matter touching his feudal lord (Hen. 32, cap. 2), a rule which establishes the principle of the legal equality of Crown and under-vassals as *parēs* in the County Court. As a fact in the province of the judicial system a difference between Crown and under-vassals is avoided in the expression used to denote them, which embraces all freeholders alike, "*libere tenentes et qui sequuntur curiam de comitatu in comitatu*," etc. "*Coram baronibus, militibus et omnibus libere tenentibus ejusdem comitatus*."

that even allowed the ordeal to be avoided by a money payment. With the poor the procedure was somewhat summary.

The law to be applied was, as understood by the Norman and Anglo-Saxon litigants and judges also, heterogeneous. After long fluctuations the necessity for a unity in this respect brought about an arrangement, according to which personal property was generally governed by the Saxon law, real property by the Norman feudal law, whilst the personal family law stood under the influence of the Church. Especially in the law of inheritance did the two systems clash. The Saxon declared an equal right of inheritance in all the sons; Norman custom and the necessities of the knights' fee led to the right of primogeniture. A middle course lay in the maxim: "*Primum patris feodum primogenitus filius habeat; emptiones vero et deinceps acquisitiones suas det cui magis velit*" (Leges Hen. I. c. 70). In the end the Norman law triumphs with regard to landed property; only where numerous old Saxon owners of the soil dwelt close together, as was the case in Kent, an equal division of the land amongst all the sons (gavelkind) remained a local custom. But it is evident that it was no longer the judgment of the *pares*, but only regulations of higher authority (in later times the judgment delivered by the royal justiciaries), that at this period were capable of laying the foundation of the English "Common law" as a universal law for all classes.\*\*\*

\*\*\* The question as to the form of the procedure before the Norman *Viccomes* will always be a most difficult one to solve. (Biener "Engl. Gesch. wornen Gericht," i. pp. 52-56.) At all events the old tradition that the Conqueror banished the Anglo-Saxon language from the courts is erroneous. The charters of the first Norman kings are issued in the Anglo-Saxon language as being the language of the country, a language which William himself endeavoured to acquire. Latin was employed as an official language only; all official transactions of the Exchequer, all judicial rescripts, all reports of the oldest law suits, all records of the *curia regis* itself, even under Richard I., are couched in the Latin language. It was evidently not the intention of the Conqueror to acknowledge his Norman feudatories as a ruling class, by recognizing their dialect as the language of the country. It was generations later before the French language occasionally appears as the

official language of royal ordinances. French was spoken in the courts, but this was a matter of necessity, seeing that the *Viccomites* and the secular great officers of the realm were for the most part Norman knights. Hence arose the important position of the clerks and under-officials as interpreters and advocates; hence also the early development of a class of inferior attorneys can be explained. A trial carried on in French, with an Anglo-Saxon under-vassal or farmer, would have been quite as difficult in the eleventh century as in the nineteenth. In the country and local courts litigation was probably carried on in a curious jargon, about as confused as the rules of law were themselves. Only in the central courts the technical framing of the procedure, and the appointment of Norman lords as judges, brought about an early ascendancy of the French tongue, which again later penetrating from the *curia regis* downwards, formed a French legal lan-

But together with the retention of the laws of Eadward the manorial courts were also retained, as was taken for granted in the law-books, and emphatically recognized in the "Carta Henrici I." The manorial courts already existing coincided with the customary rights of the Norman feudal lords; though these latter were in some particulars more extensive. In the mixed law which resulted, a feudal idiomatic phraseology prevailed (e.g. the term "*curia baronum*"); yet here the state of affairs, partly old and partly new, required to be separated from one another.

1. As a matter of course, the occupier of a manor claimed jurisdiction over his *villani*, a jurisdiction extending over the transfer of property, all disputes arising in consequence, the reservation of services and performances, and disputes of the tenants among themselves. Later legal language calls this old manorial court sitting in civil causes the "customary court," and centuries elapsed before the practice of the courts allowed the peasant class the right to bring an action for recovering their property in the royal courts.

2. The Anglo-Saxon rule, especially under Cnut, had already extended the manorial jurisdiction to the *allodiarii*. The feudal system now introduced the principle that to the mesne lord of the soil belongs also a judicial control over the land of his grantees. In consequence of this, the Norman landlord appears also to have claimed a subjection to his authority of the freeholders who had been attached to the fee of a vassal, rendering contributions, protection moneys, or performances analogous to the under-vassals. The practice of the Exchequer regarded the "right to suit of court and service" on the part of the independent small landowners as naturally included in the grant of the Crown fief. "As soon as a man found himself obliged to do suit and service in the court of his stronger neighbour, it needed but a single step to turn the practice into theory, and to regard him as holding his land in consideration of that suit and service" (Stubbs, i. 189). The private jurisdiction over the *libere tenentes* that thus arose, was now called "*curia baronum*" ("court baron"), and it is apparent from later circumstances that the Norman administration uniformly recognized such an institution, at least for the disputes of the tenants among themselves. The mode of procedure was left to the custom of the individual localities. "*Placita cujusque curiæ secundum consuetudines suas agitantur. Solent autem placita ista in curiis dominorum deduci secundum*

guage. How the procedure in the Royal High Court became formed under the influence of the clerks of the court and the attorneys at the close of the

twelfth century is clearly shown by Glanvill's legal works. (See Phillips' History of English Law, ii. 97-384.)

*rationabiles consuetudines ipsarum curiarum, quæ tot et tam varisæ ut sunt, in scriptum de facili reduci non possunt*" (Glanvill, xii. 6). The law books, therefore, pass by the procedure of the Court Baron in silence, but teach as an established principle that it exercises a civil jurisdiction analogous to that of the Hundred Court, in real actions as in actions of debt. It was not until later that personal actions became as a rule limited to petty matters not exceeding forty shillings; before bringing a principal action concerning a "*liberum tenementum*" the plaintiff was obliged to sue out of Chancery a "*breve de recto*," acknowledging the judicial authority of the King, and his lordship paramount over all landed property.

8. The manorial courts of later Anglo-Saxon days also exercised a criminal jurisdiction to an unequal and often to a very wide extent. Beyond this, according to the principles of the feudal law, the lord of the fee claimed for the *curia feudalis* a certain criminal jurisdiction over the under-vassals, or at all events a right of distraint on movable goods, for the purpose of maintaining military discipline. Both principles appear blended in the Norman administration, forming a uniform and inferior criminal jurisdiction of the *curia baronum* over under-vassals, *libere tenentes*, and farmers. This criminal jurisdiction, however, is confined to small offences and thefts *in flagranti*. For financial reasons all the heavier cases were reserved to the King, and grants of more extensive rights were, from the Anglo-Saxon period, for the most part restricted.†

† As to the system of the Norman *curiæ baronum*, see Biener, "Geschichte der Geschw. Ger." i. 48-56. The later jurisprudence distinguished under technical names the various component parts of the Manorial Court. The civil jurisdiction over under-vassals and freeholders in regard to their dependent lands was called Court Baron; the Manorial Court, in its original jurisdiction over those living upon fief and domestics, was called Customary Court. The Court leet, finally, was a royal police court over all living upon the land, first instituted by later grant. The *Leges Henrici I.* employ for the Manorial Court the term "*Halimotum*" (Hen. 9, sec. 4; 20, sec. 1; 57, sec. 8; 78, sec. 2), which seems to belong to the more modern feudal language. The most frequent expression is "*saca et soca*." The *Leges Henrici I.* cap. 20 contain first of all the general rule: "*Archiepiscopi, episcopi, comites et alii potestates, in terris propriis potestatis suæ, sacam et socam habent, tol et*

*theam et infangenetheaf; in cæteris vero per emptionem, vel cambitionem, vel quoquo modo perquisitis socam et sacam habent, in causis omnibus, et hallimotis pertinentibus, super suos et in suo, et aliquando super alterius homines.*" Of course, the King has also the same manorial jurisdiction over his own demesnes: "*omnium terrarum, quas rex in dominio suo habet socam habet; quarundam terrarum maneria dedit, sed socam sibi retinuit singularem et communem. Nec sequitur socna regis data maneria, sed magis est ex personis*" (c. 19). The later Anglo-Saxon deeds of grant contain the clause: "*concedo et libertatem plenariam, id est socam et socam, tol et theam, et infangenetheaf, monbrich, hemsocne, forstall*" (cf. Cod. Dipl. iv. 167). That the sense of the words was no longer clearly understood was no hindrance to, but rather a good reason for, retaining them as a formula. When the Norman Kings (as Henry I. on his ascending the throne) were obliged to meet their Crown vassals



However well ordered these judicial arrangements might appear externally, their inner life was defective and disordered. The greed and arrogance of the Norman *vicecomites* and vassals made these courts places of arbitrary dealing and oppression. The rules of court and of law to be applied were for many generations contradictory; the judges were kept asunder in various ways by national antipathy. The Conqueror had intended to have the more important customs of each county determined by commissioners; but this work could not be carried out in consequence of practical difficulties. The private codes which were formed at the same time were entirely inadequate for the task. The conflict of the legal conceptions of different nationalities left a wide field open, which the partiality of the Norman country magistrate and bailiff took advantage of for his countrymen and compeers, or for the highest bidder. It is only from the occasional interference of the King, and the partiality of the *vicecomites*, which is mentioned as a matter of course in almost every contemporary narrative, as well as from the general detestation in which the office is held, that we can conjecture what manifold injustice is hidden behind the silence of history. These internal defects bring the Anglo-Norman judicial system into a state of agitation, which by a continuous process of pressure from the lower upon the higher class brings about a centralization of justice, in the following order.

I. The local courts become gradually limited. As private rights of the landlord (rights of property) they still exist unabridged, so far as the jurisdiction of the manorial courts over the *villani* extends; that is, as a "customary court." The jurisdiction of the *curia baronum*, on the other hand, is regarded as a personal grant, and can accordingly be refused, "*non sequitur socna regis data maneria, sed magis est ex personis*" (Hen. I. c. 19). For financial and political reasons the royal authority (different from that on the Continent) impeded every development of the court baron, and without attacking it in principle, gradually neutralized the judicial power of the mesne lords. Different circumstances tended to this result.

(a) The scattered position of the lords' possessions rendered it an exceedingly difficult matter to form great feudal manors in consequence of the great distances (Hen. I. c. 55). The principal seat of the lord, the "*caput baroniæ*," might well

with friendly assurances, the manorial rights formed primarily the subject of these promises: "*Sacam in terra et in aqua, in silvis et in campis, tolmetum et team, grithbreacum et hamsoenam, forstecallum et infangthief, et in fugitivo-*

*rum receptionem super eorum proprios homines intra burgos et extra, tam plene et tam directe, quam mei proprii ministri ipsum exquirere deberent et super tam multos tanorum quot ego eis concessi*" (Lye's Saxon Dict., App. Chart. No. 6).

be a place of meeting of the under-vassals for festivities, investitures, and the like, but could be no baronial court for the collective vassals, no "*cour de baronie*" in the French sense. A court baron of this description was more important, as numerous under-vassals and the personal presidency of the lord could be added to the ordinary freeholders. But the judicial power of the great feudal lord, as far as can be proved by documents, was only an aggregate of manorial jurisdictions, not different in quality from the jurisdiction of a manor.††

(b) To this was added the superintending and rival power of the King as the highest judge in the land, which in the spirit of Norman administration was zealously exercised on account of the perquisites. The Exchequer records show that judicial mandates proceeding from the royal court very early admonished the feudal courts to administer justice under the threat that in default the supreme power would intervene. The "writs of right" directed to the small patrimonial courts were openly issued, as letters patent, and were despatched by the Vicecomes. They contained the regular clause, "*et nisi feceris, vicecomes hoc faciat, ne amplius clamorem audiamus pro defectu recti.*" Every defect in this customary judicature was made use of for the same purpose. The right of distress which belonged to the mesne lord is only a sequestration without the right of sale. In cases of execution the King must accordingly be appealed to, and the matter given over by writ to the sheriff to be further dealt with. Every complaint, that the manorial court refuses justice or does not properly administer it, transfers civil as well as

†† The owners of the greater lordships, surrounded by the officials of their households, held solemn feudal courts (Madox, i. 101), and in their documents made use of a style analogous to that of the royal administration of justice: such expressions as "*Dapifero meo et omnibus baronibus meis et hominibus meis Francie et Anglie,*" are frequently to be found in the "*Monasticum Anglicanum,*" and in the "*Formulare Anglicanum.*" But the scattered position of their lands did not permit in practice of any other relation than that of intermediate Crown vassals. The under-vassals could not come from distances of twenty or a hundred miles to their feudal courts, in order to hold sittings once a month, after the fashion of a hundred court. With the *caput baronie* the jurisdiction of several contiguous manors was often united (Heywood, 148); but it never went beyond the scale of a plurality of manors. "Although an

honor consists of many manors, and there is for all the manors one court only held, yet are there quasi several and distinct courts for several manors" (Scroggs, 81, 82, cited by Scriven on Copyholds, 6). Regarding the defective nature of the manorial means of execution, see Scriven, vol. ii. 757. As to the lending of lawmen, which in later times no longer occurs, see Ellis, i. 236, 237. By the statute, *Quia Emptores*, 18 Edw. I., the development is legally curtailed. In the rare cases, in which in later times the King makes an hereditary grant of the administration of a hundred, this is done with reservation of the jurisdiction of the Royal Judges and Sheriffs. A request of the landlords to have their own prisons was refused by the Statute of Merton: "*Magnates petierunt propriam prisonam de illis, quos caperent in parois et vicariis suis. Quod quidam dominus rex contradidit, et ideo differtur.*"

criminal matters to the Royal Court; in like manner appeals by "writs of false judgment." Where the manorial court has not been properly composed (which often occurred, owing to the scattered position of the estates), the matter at once devolved upon the Royal Court. All attempts made to form a superior jurisdiction of the greater feudal courts over the sentences passed by a smaller curia, are finally cut short by the Statute of Marlebridge in the rule, "*Nullus de cætero (excepto domino regio) teneat placitum in curia sua de falso iudicio facto in curia tenentium suorum; quia huiusmodi placita specialiter spectant ad coronam et dignitatem domini regis.*"

(c) Decisive reasons were also contained in the nature of the law that was to be applied. After the lapse of a century, the administration of justice had become concentrated in a class of professional judges. Compared with this arrangement the formation of the private courts became more and more insufficient. In like manner the mode of taking evidence, especially the procedure with compurgators, "*legis vadiatio*," became less and less practicable. Whilst in the royal tribunals a reform adapted to the times was introduced, which developed a civil jury, and somewhat later a criminal jury, they were still denied to the private courts, the insignificance of which rendered such reforms for the most part inapplicable. The fact that the private courts remained upon their old basis, whilst an untiring legislation brought the Royal Courts important improvements, also contributed to the unavoidable decay of the former.

(d) When in course of time great lordships reverted to the Crown in consequence of escheat or forfeiture, these extensive judicial powers were in the re-grants frequently withheld; and generally the sub-vassals were made immediate vassals of the King. By this means, and also owing to the ultimate interdiction of subinfeudation, the courts baron lost their best lawmen. It was next assumed that where there did not remain at least two freeholders to compose the court, their jurisdiction was suspended. All these defects are seized upon by the higher courts, and private jurisdiction becomes merged of the county and royal courts of first instance.†††

††† As a counterpoise to the great feudal lords, the opposite maxim was followed in favour of the towns. London and certain larger towns obtained by privilege a mayor, or a town-reeve, who apparently exercised the whole criminal and civil jurisdiction of the Vicecomes, and entirely superseded him. Other towns also, in order to lighten their judicial duties, began to show a constant tendency to form a

special court of their own, which was desirable for the wants of a more closely packed population. Such grants were now made by the king, as lord-paramount, by charter, according as the necessity of the case required, or on petition, and on the payment of high dues. In the bishops' sees the grants are generally old; in abbey lands they took place regularly. In certain charters of Henry II., a complete exemption

II. **The County Courts**, as regular country courts of the *liberi homines* of the realm, passed over unchanged, with their two grades of Hundred-gemôte and Shire-gemôte, into the Norman period. In their case also a curtailment of competence took place.

1. The Hundred Court appears with its monthly sittings in the *Leges Hen. I.* c. 51, sec. 2, "*Debent autem ad singulos menses, i.e. per annum duodecies, congregari hundreta.*" In like manner c. 7, sec. 4: "*Debent autem hundreta vel wapentagia duodecies in anno congregari, et sex diebus ante summoniri.*" In Henry I. 41, sec. 6, it is repeated that a *hlāford* shall present his accused man at the hundred. But beyond doubt the hundred court suffered considerable damage from the fact that the court baron became extended with the competence of a hundred court to under-vassals and *libere tenentes*. The hundreds appear almost everywhere broken in upon by manorial courts; and, owing to the dissensions prevailing among the lawmen, give the feeblest possible guarantee to the weaker against the stronger. It is scarcely conceivable how, at this time, considering the number of the hundred courts, an adequate composition of them was possible; but it is very easy to understand that the *Vicecomes*, overburdened with business, had little inclination to hear, twelve times a year in each hundred, small civil causes which brought in only small fees. From the supplementary relations, which always subsisted between county court and hundred court, it followed that numerous civil actions were brought into the county court. That the hundred court was, notwithstanding its apparently small judicial activity, regarded as a regular district court, is explained by the tenacious adherence of the people to a judicial system, which was the last buttress of the social conditions of the ordinary free man. The character of lawmen in the hundred court remains the legal mark of the *liberi et legales homines*, who keep their position by the side of the class of knights, and who furnished the most numerous members for the later important trials by jury.

2. The County Court, now "*Curia comitatus*," has, from old custom, jurisdiction in more important cases, over actions brought against Thaners (now "*milites*"), and other influential persons. Already in the Anglo-Saxon period its relation to the hundred court was a supplementary one. From the sphere of the hundred courts and courts baron, a number of civil causes are now brought thither. Of criminal offences,

from all interference of the *Vicecomes* is pronounced, and consequent immunity from the suit of court in the county. Under John grants were made in great

numbers, which, in the order of things existing in those days, created, at all events, a special "court leet."

we find mention most frequently made of thefts and smaller offences (*metletæ, verbera, plagæ, transgressiones*). The accumulation of business brought it about that later (as decreed in Magna Charta) twelve sittings were held annually. Even the *Leges Henrici* 51, sec. 2, say, "*Comitatus bis, si non sit opus amplius, congregari*." It appears, therefore, that in addition to the two legal Shire-gemôtes, prorogued sittings were introduced, to which, as instituted court sittings or "county courts," only the interested parties were summoned. But even thus the county court was inadequate to settle the great number of small criminal cases. Hence from the county court a "*turnus Vicecomitis*," "Sheriff's Tourn," was separated off—a new institution, belonging to this period, according to which the *Vicecomes* journeys, at least twice a year, through the several hundreds, and, in the capacity of Royal Commissioner, disposes of the petty misdemeanours, which were most practically dealt with at the places where they were committed. This *turnus Vicecomitis* is not to be regarded as an original institution of the hundred, but as a branch of the county court, by virtue of royal commission; which is referred to by Henry I. c. 8, sec. 1: "*Speciali tamen plenitudine si opus est, bis in anno convenient in hundredum suum quicumque liberi, tam hudefest, quam folgarii, ad dinoscendum scilicet, si decaniæ plenæ sint, etc.*" Similar delegations to a commissioner were to be found in Normandy. On these circuits the whole male population of the small districts appeared for police purposes, whence it followed that the name of people's court, "court leet," was customarily applied to these court-assemblies *per delegationem*. Under the Norman fine and fee system there arose from them a local police-court (cap. 12), which was further a subject of grants to landowners and parishes. From the position of the *Vicecomes* as royal commissioner, it can be seen why the Tourn is regarded as a royal court of record, whilst the old Anglo-Saxon county court is not one. In the multifarious business thus brought before them, the *Vicecomites* make use of their higher bailiffs as substitutes; the lower bailiffs are employed for summonses, executions, and service at court sittings. (2)

Numerous and important as the county causes now became,

(2) The county and hundred courts have of all Anglo-Saxon institutions preserved most faithfully their original form, and we find that the *Leges Henrici*, cc. 7, 8, 14, 41, 91, and a number of other passages, describe the county and hundred courts purely in the form in which the Normans found them. Now that the sheriff, according to the new arrangement, must twice a year

hold a police-court (*turnus Vicecomitis*), we meet (as early, indeed, as the *Leges Henrici* I.) with two sorts of courts in the hundred—the great court for the Frank-pledge, the Sheriff's Tourn, held twice a year; and the smaller court, the *curia parva hundredi*, held every three weeks, presided over by the bailiff of the hundred, for the decision of petty civil cases.

a diminution of their competence is very soon visible, owing to the royal reservation of actions touching Crown fees, and of the heavier criminal cases, of the extent of which we shall have to speak later on. In the county court also is seen a tendency to go higher; the reason for which must be sought in the partiality of the sheriff, and, still more, in the state of the law and judicial decisions. The duties of members of the village communities to act as judges (in Germany styled *Schöffen-Verfassung*) cease everywhere when compound modes of property and social conditions take the place of simple and uniform tenures. In Anglo-Norman England, the law of possession had from the first to develop itself out of discordant elements, by applying the Norman feudal law to Saxon modes of tenure. In like manner a unity of legal views on the part of the judges was prejudiced by contrasts of nationality, and gradually, too, by those of the modes of tenure, in proportion as provincial, civic, and ecclesiastical legal spheres came into daily collision. The diversities of interests and views of social life, as it became settled, effaced the sense of legal unity, and made it necessary that the development of law should proceed from State authority. Decisions had here, at an early period, to be gathered from interpretations and analogies; for a customary law based upon the "legal customs of the community" would have been a different one in almost every county, hundred, and town, according as nationalities were confused and knights, freeholders, and citizens were blended together. In a still greater measure was this true of criminal law and criminal procedure, in which, for the maintenance of the public peace, the most important principles had to be modified by the higher authorities.

III. From this internal process of decomposition can now be explained the position of the royal jurisdiction under the Norman name of "*curia Regis*." Probably at the time when the Anglo-Saxon judicial system was confirmed, many reservations demanded by the feudal system were made. Of civil matters, legal disputes as to Crown fiefs were reserved to the King, for his personal instruction of the court; as were likewise differences as to *advocatiæ*, and the like, out of regard to the state of ecclesiastical relations. The ancient judicial authority of the King could also summon before him every action from the lower courts, partly on account of *defectus recti*, and partly when it was assumed that in the lower court impartial justice was not to be obtained.

It was not intended by this, that for all such cases a special court of lawyers should be formed at the royal court. The majority of such cases were referred by commission to the county court or some neighbouring county court, as extra-

ordinary matters, not lying within the *firma* of the *Viccomes*. Only in case of actions against the greatest magnates, the King sometimes appointed a commission of prelates and vassals of the Crown, to decide the matter at court. The composition of the county courts, which excited little confidence, and the want of unity in the principles of law, as applied to rights of property, promoted an appeal to the royal fountain of justice; especially from the time when special commissioner-judges (*justiciarii*), who were free from the animosities and eagerness for fees of the sheriff, began to be appointed for this purpose. So soon as the way was thrown open, under Henry II., a flood of civil causes immediately swept into the royal court, which was now opened on payment of fees, to the most varied legal claims. The condition of things resulting herefrom is shown in the treatise of Glanvill, i. c. iii., where a considerable list of reserved civil causes appears, with the further addition "*quodlibet placitum de libero tenemento vel feodo potest rex trahere in curiam suam, quando vult*" (cap. v.).\*

The course of criminal justice is analogous. Here also at first a reservation was made of certain more serious offences, such being in Cnut's laws reserved to the Crown from the jurisdiction of the private courts (Hen. I. 10). The mass of the reserved cases was, however, at first assigned to the county court for hearing. Only in cases of the prosecution of prelates and the highest vassals of the Crown, and even then only in a few cases, which are recorded in history, did the King make use of his privilege of administering supreme criminal justice through a commission of prelates and vassals of the Crown duly appointed; and this criminal authority generally commuted capital sentences into confiscations and forfeiture of fiefs. But in this respect the royal reservation increases, and even Glanvill reckons all "*felonis contra pacem regis*" among the Crown cases reserved: even frays and brawls, if they are tumultuous in their character, "*si accusator adjiciat de pace regis infracta*" (Glanvill, i. cap. 2). The heavy criminal offences appear now as "*felonis contra*

\* The jurisdiction of the *curia regis* will be discussed at greater length in connection with the central administration (caps. 16, 17). The royal reservation of civil causes was probably originally limited to the provision in the Carta Henrici I., touching litigation as to Crown fees. Glanvill, i. 3, reckons as reserved cases: "*placitum de baronia, pl. de advocacionibus, questio status, pl. de dotibus unde nihil, querela de sine facto, de homagiis faciendis, de relevationis recipiendis, de purpresturis, pl.*

*debitis latroorum.*" Certainly, a more extended meaning is afterwards given by Glanvill's words (i. 5): "*quodlibet placitum de libero tenemento vel feodo potest rex trahere in curiam suam, quando vult.*" From the time of Henry II. begin the numerous cases of payments for the acceptance of the cause at the royal court under the heading "*ne placitet nisi coram Rege de tenementis suis; ne ponatur in placitum nisi coram Rege vel ejus capitali Justiciario*" (Madox, i. 19 et seq.).

*pacem domini regis*," and in regard to the mode of proceeding as "*placita coronæ*." A better spirit is infused into this portion of the legal administration by the severance of the farm interest (*firma*) from the judicial functions; which was effected by the appointment of royal *justiciarii* in the place of the *Vicecomes*. The reservation of the royal right of interference now develops into a periodical delegation of matters to criminal judges.\*\*

The reign of Henry II. is a period of transition, which in its centralizing spirit brings the more important matters through travelling judges to the court (*curia*), and which also by forming a body of professional judges prepares the way for a more solid system of justice in the whole realm according to the principle of unity. The system of royal *justiciarii* about the middle of this epoch forms such a connected whole, that a special exposition of the central administration is needed (cap. 17). The transition to the administration of justice by official and professional judges, which did not take place in Germany until centuries later by the adoption of foreign law, was accomplished here as early as the twelfth century. Considering the tenaciousness with which the Saxon population clung to their customary law, this would have been almost inconceivable, if it had not been necessitated by the bad state of the county courts. But it also goes hand in hand with an entire transformation in the old participation of the lawmen in judging, which change, as early as Henry II., already begins to assume the outlines of a civil jury, and under Henry III. that of a criminal jury.

The great change which here occurs depends chiefly upon royal ordinances, even upon quite informal instructions. Only in the case of a few decisive innovations did Henry II. find a conference with assemblies of notables by means of the so-called "Assizes" advisable. Most new arrangements pro-

\*\* The original reservation in criminal matters is summed up as follows in the *Leges Henrici*, i. c. 10, "*Hæc sunt jura, quæ rex Angliæ solus et super omnes homines habet in terra sua: infraactio pacis regis per manum vel breve datæ; danegildum; placitum brevium vel præceptorum ejus contemptorum; de famulis suis ubicunque occisis vel injuriatis; infidelitas et prodicio; quicumque despectus vel mali- loquium de eo; utlagaria; furtum morte impunitum; murdrum; falsaria monetæ mæ; incendium; hamocœna; forestæ*," etc. This passage is in part a translation of the *Leges Cnuti*, II. 12-15, and it is doubtful how old the confusedly added clauses may be. At

the close the author, however, adds: "The meaning of this reservation is, that the hearing of these more serious criminal cases does not belong to the general farming of jurisdiction: '*Hæc sunt Dominici placita Regis nec pertinent Vicecomitibus vel Apparitoribus vel Ministris ejus sine definitis prælocutionibus in firma sua*.'" It accordingly did not exclude the power of assigning all these cases to the commissioners to deal with before the county court, which was very frequently done until Magna Charta. The assertion in Glanvill, i. 2, is more reliable, but it furnishes no proof of the exact time of extension.



ceeded from necessity, and were begged for by the litigants at court as a boon, and were moreover of such a technical kind, that the improved administration of justice could only evolve itself slowly and irregularly out of the practice and better spirit of the magisterial body. Though according to the State records as yet published, much still remains defective, the following may be taken as the situation at the close of the period.

The judicature had been reformed by ordinances of the King; his administrative power had to a considerable extent remodelled law, judicature, and procedure. The arrangement of the court had been transferred in all important civil and criminal matters to the person of the Sovereign; "*in curia domini regis ipse in propria persona jura decernit*" (Dial., i. cap. 4).

The judicial decision in these cases rests no longer with the lawmen of the county, but with *justiciarii* appointed by the King, for the most part officials educated in the law, to whom, as immediate organs of the royal administration of justice, the county courts, as inferior courts, are subordinate.

The ancient participation of the people in the administration of justice is limited to what in this altered order of things the members of the community still were, and to what they could perform; that is to say, to the determination of the *questio facti* by commission appointed for this purpose, in the form of a civil and criminal jury. The customary manner of *inquisitio* by means of sworn committees of the community, which was in use at the time of the framing of Domesday Book, for the purpose of deciding on the royal privileges, the levying of taxes, determining the degrees of military service according to the assize of arms, and for the actual settlement of local affairs, is now made use of to substitute a more rational mode of proof for the obsolete modes of taking evidence by means of compurgators, ordeals, and duels.\*\*\*

\*\*\* The development of the jury in civil actions has been fully discussed and determined in all its technical details in the great treatises of Biener, Brunner, Forsyth, and others, so that it suffices to notice the results. The connection of these technical institutions of procedure with the political organization, is important for constitutional history. Where an energetic central government, like that of Charlemagne, or of the Norman kings, with its defective official system, needs an exact local certification, it is by the nature of things referred to the testimony of the *villa*, the *hundredum*,

and the *comitatus*. This testimony can only be practically delivered by a representation of those bodies, that is, by a provost and four men for the *villata* by the *duodecim legales homines* for the hundred, and by the twelve or more *militia*, etc., for the *comitatus*. For the greater bodies, those of the *hundredum* and the English "burghs" the number of twelve was fixed already in the Anglo-Saxon period as the proper representation. This combination of an action of the government with an action of the local bodies was made so necessary by the circumstances of the case, that

At the close of this period we find the civil and criminal procedure based upon a systematic co-operation of the Royal Judges with committees of the community; and already in Bracton's treatise the more modern fundamental principle of the judicature is laid down in its universality "*Veritas in juratore, justitia et judicium in judice*" (Bracton, fol. 186 b.). The legal decisions which are now pre-eminently the application of general laws, pass from the community to the official professional judges. But the former participation of the community, consisting in passing sentence, compurgating and giving evidence, is reduced to the determination of the "question of fact" by committees selected out of the body of the hundred.

It is evident that thus the judiciary powers of the King have become something different from the formal and merely supplementary judicial office of the Anglo-Saxon sovereign. The King has become the "fountain of justice" in a new acceptation of the term, a royal supreme judge in the most extensive sense, and in sense until then unknown to the Middle Ages.

the Church, with its synodal courts, and Charlemagne with his attempts of secular presentments and *recognitions* were obliged to take the same course. The material part of the innovation consisted, as Brunner remarked with perfect truth, in the fact that the magisterial power of itself, by virtue of its office, helps to the furnishing of evidence, whilst in the ancient *legis actiones* the proof was purely the concern of the parties. So soon as the principle of an official determination of evidence (*inquisitio*) had for once

and all become established, the modes of taking such evidence depended upon the constitution of the offices, and the official districts. In this sense a modified introduction of the Frankish institutions which had long been in vogue in Normandy took place, and these were now adapted to the English *comitatus*, *hundreda*, and *villate*, and technically developed by the jurists of the *curia regis*. The action of the jury in criminal affairs is dealt with on p. 189.

## CHAPTER XII.

## III. The Development of the Norman Police Control.

As the Anglo-Saxon sovereign, in his capacity of supreme guardian of the peace, proclaimed the "King's peace" at his accession, so did also the Norman kings. This proclamation (at all events from the time of Henry II.) was regarded as valid for the whole of the reign; occasions, however, often presented themselves for general and special proclamations of peace. In the oldest Treasury records we find fines of five marks, eleven marks, and £20, "*pro pace fracta*," especially recorded against Norman lords. The oldest regulations on this point are only repetitions of existing arrangements; but in the hands of the Norman sovereigns they continually attain greater dimensions.\*

I. The Anglo-Saxon principle of police sureties is repeated in the ordinance of William I. c. 8 (Charters, 84): "*omnis homo qui voluerit se teneri pro libero sit in plegio, ut plegius eum habeat ad justiciam, si quid offenderit. Et (si) quisquam evaserit talium, videant plegii, ut solvant quod calumpniatum est, et purgent se, quia in evaso nullam fraudem noverint. Requiritur hundredus et comitatus, sicut antecessores statuerunt.*"

\* That the Norman-national police regulations are a continuation of the Anglo-Saxon system of maintenance of the peace is shown by the detailed references of Palgrave, ii. 105 *et seq.* The difference between the "*Pax data manu regis*," and the "*pax a Vicecomite data*," is put forward in Henry 79, secs. 3, 4; the equal value of all immediate and mediate peace-proclamations in Edw. 12, secs. 1, 27; as to its reaction upon private feuds, see Bracton, i. 2. c. 35, sec. 5; Fleta, i. 3. c. 16, sec. 16; Britton, 68; and Allen, "Prerogative," 121. Its connection with the Anglo-Saxon police security, in consequence of the confused statements of the *Leges Eduardi* c. 20, has provoked much controversy. (See the detailed account in Waitz, "*Deut. Verf. Gesch.*," 2nd edit., 1865, p. 426-457.)

The author of that private collection does not here quote the words of the law, but only gives descriptions, in which he endeavours to elucidate to his contemporaries the ancient police system of the country. The word "Frithborg" (according to Lambard "Freoborg") which there occurs, probably belongs more to the popular language than to the laws. "*Francplegium*" is the Norman translation in the official vernacular of the times. The changes during the Norman period probably consist merely in the altered method in which the Exchequer, and the royal magistrates with increased military and police powers, exact the fines in the most summary fashion from the "obstinate and ill-disposed" communities.

In like manner the responsibility of the Thane for his dependants is found in the *Leges Eduardi*, c. 21; that the vassals of the Crown should have their *milites* and *servientes* under their security, and these again their "*armigeros vel alios servientes*." To establish an effectual control, the Norman administration now introduced an annual revision of the police unions, the "*visus francplegii*," view of francpledge. This revision was combined with the circuit of the *Vicecomes* at Michaelmas, and lasted for centuries, and in name even down to the present day: "*Bis in anno convenient in hundretum suum quicumque liberi, tam hudefest quam folgarii, ad dinoscendum, si decanix plenæ sint, vel qui, quomodo, qua ratione, recesserint vel super accreverint*" (Hen. I. c. 7). In these laws only general surety, a responsible pledge, or two pledges are primarily spoken of. But the Norman financial administration has in this as in other cases introduced a more rigorous mode of exaction. The Norman official, who had nothing in common with the communities, summarily demanded the fine from the people *tributum* (in gross), and left them to settle the matter among themselves. The result was that in this manner the system of police sureties developed into a mutual responsibility of the tithing, and it can thus be explained how in the twelfth century the private compiler of the *Leges Eduardi* considers the police suretyship as a mutual one; "*ita quod si unus ex decem forisfacit, ad rectitudinem novem haberent decimum*" (Edw. c. 20, sec. 1), yet in such a way, that the guilty perpetrator, if discovered, himself pays the indemnity (sec. 2). If he escapes, and has no property, the provost of the tithing must make compensation "*de suo et frithborgi*" (sec. 4). Following these passages, scholars have erroneously invented a system of "mutual-surety" which they allege to have existed in the Anglo-Saxon period. The later law books also mention it as being a duty incumbent on the community; e.g. Bracton, 124: "*De eo autem qui fugam ceperit, diligenter inquirendum, si fuerit in francplegio et decennæ, tunc erit dacenna in misericordia coram justiciariis nostris, quia non habent ipsum malefactorem ad rectum*" (see Fleta, i. 27, sec. 4). Certainly the Anglo-Saxon law of settlement, the necessity of every vagrant being received into a parochial union, could be most effectually enforced by this system of exacting penalty from the community in gross; and thus it remained for centuries an instrument for harshly treating vagrants and suspected persons. (1)

(1) That from the first a transfer of Anglo-Saxon institutions was intended, is also shown by the Exche-

quer accounts. In numberless cases, districts were fined for "harbouring an unknown person without having

II. This rigorous treatment of the tithing was followed by an extension of the responsibility of the larger union of the hundred. The insecurity of the Normans in the midst of an exasperated population was the cause of the issue of a decree by William, that any hundred should at once pay forty-six marks, within whose boundary a Norman should be found murdered, unless the perpetrator were captured within five days. (Will. I. 3; Charters, p. 84.) Here again the royal right to issue ordinances is conspicuously seen. A Saxon Witenagemote would most certainly have claimed the right of agreeing to such innovations. But now the threatened Norman community eagerly accepted an effectual protective measure which the other party was not in a position to gainsay. But soon the administration extended the principle still further, so that, according to the Exchequer accounts, a fine is charged upon the hundreds "in gross," as a subsidiary responsibility, where the village does not possess the means of paying the police fines it has incurred. (2)

III. A step further and a duty of presentment was developed out of these beginnings. The necessity of not leaving the prosecution of breaches of the peace purely to the pleasure

taken *francplegium* of him," and for "harbouring a man who was not in the *francplegium*," for receiving a man "without Tething," and so on. (Madox, i. 546 *et seq.* 555.) See in Gervase (i. 565), where the hundred of Peckham and others are fined, because they wittingly allow a man to live amongst them without "*francplegium*." The yearly recurring view of frankpledge was an efficacious measure, but one which was not exactly essential to the system, and in many districts was not put into force at all. The later exercise of it is shown in Magna Charta; in Fleta, ii. 52, 72; Britton, c. 29; Horne's "Mirror," c. 1, sec. 16. The institution was not introduced in those provinces lying north of the Trent (Palgrave, ii. 123), which fact seems to prove that it proceeded from the Conqueror himself, at a time when these northern provinces had not yet become included in the Norman government.

(2) The extension of the police responsibility to the hundreds in the case of *murdrum* rests upon a direct ordinance of the Conqueror. (Will. I. c. 2; Charters, 84.) The innovation consists in the principle of the responsibility of all the men of the hundred, separately and collectively, as well as in the enormously high

penalty of forty-six marks in silver. In practice this was rendered all the more severe by the legal presumption, that every unknown corpse is to be considered as that of a Norman, until proof given that the murdered man is an Englishman. The author of the *Leges Eduardi*, in cap. 15, represents the case, as if according to Anglo-Saxon regulations the forty-six marks were to be primarily collected in the guilty *villa*, and according to the newer regulation the sum was to be gathered from the hundred, to obviate the ruin of the small communities. The *Carta Wilhelmi* itself speaks of the lord of the manorial court being primarily answerable, the hundred making up the deficiency in the sum, "*ubi vero substantia domino defecerit, totus hundredus in quo occisio facta est communiter soluat quod remanet.*" From these ordinances and the more ancient usages, there arose in practice a subsidiary liability of the hundred for other police penalties also. (See, as to the frequent penalties inflicted on the hundreds, Madox, i. 565, and the whole section on the subject of amerciaments.) The county of Shropshire was exempted from this system, as were also favoured cities like Worcester and Bristol.

of the injured party, but of prosecuting them *ex officio* in the interest of the injured commonwealth (the King), had even in the Anglo-Saxon period led to a decree of Æthelred III. (8, sec. 8); which speaks of a presentment of breaches of the peace "by twelve Thaness of the hundred." This decree apparently remained isolated and was soon forgotten. But the Norman *Vicecomes*, wherever he was confronted by the Anglo-Saxon population, was from the first ordered to settle local matters by the help of neighbours sworn in for this purpose. The exact time at which a procedure of this kind became established for police purposes, and whether it was connected or not with Anglo-Saxon institutions, cannot be determined. But when the stormy times had passed by, and the delegation of travelling commissioners from the court (*justiciarii*) had become a standing institution under Henry II., the chief organs of the State were ready and able in conjunction with the *Vicecomites* to carry out and maintain such a presentment. Traces of this institution are first found in the Assize of Clarendon, A.D. 1166. The "*capitula placitorum coronæ*" of the years 1194 and 1198 (Statutes of the Realm, i. 33 *et seq.*) mention as an already established practice that the travelling judges were furnished with forms of questions, by which they had to examine the communities as to punishable offences and the infringement of the royal prerogative. On the Hundred Court days of the sheriff, this was naturally united with the view of frankpledge and the other criminal and police business of the *Vicecomes*. As in the Assize of Clarendon, so again do we find the "*inquisitiones coram Vicecomitibus*" specially mentioned in the statute of Marlebridge (1267), c. 25; in the stat. Westminster i. c. 11, 15; stat. Westminster ii. (1285) c. 13, according to which the under-bailiffs of the exempted districts are to adopt the same procedure. About the middle of the thirteenth century the legal work of Bracton gives us a picture of a perfectly developed system of presentment; and still more in detail, Fleta, i. c. 19, 20, ii. 52; Britton, c. 2-21, 29; the Mirror and the Statutum Wallie (1284). The travelling judges find the representatives of the hundreds all assembled. By a preceding proclamation, they proceed to form a presenting jury in such a way that, out of every hundred, four knights are appointed, who, as elective officers, appoint twelve *milites* or *liberos et legales homines*. At the commencement of the proceedings the free townships and districts are bound, through the medium of their *præpositi*, in accordance with the instructions contained in certain forms of inquisition, to present the offences that have occurred in the interim. The twelve jurors then deliver their verdict

on this *indictatio*, and further as to whether anything has been withheld. The formulæ of inquiry—which included what the jurors thus appointed knew of crimes that had been committed, and their probable perpetrators, of infringements of royal rights, of official misconduct, and extortion on the part of provincial magistrates and under-magistrates, and of offences against the police laws affecting weights and measures, bread, beer, and wine—contained, with later additions, as many as a hundred and thirty-eight questions. The twelve jurors of the hundred are sworn in with the following formula: “*quod veritatem dicam de hoc quod a me interrogabitur ex parte domini regis.*” The answer given by the twelve jurors is regarded as an official indictment or presentment, and can at once come on for trial. Until the close of the Middle Ages we find travelling judges, sheriffs, and local courts, all exhibiting an inquisitorial activity which, through the formulated instructions, develops itself uniformly. The whole male population is accordingly assembled at short intervals, not now in order to find a sentence as lawmen, but in order to give account of the way in which peace and order has been preserved, to take the oath of allegiance when required, or to renew the same, or, finally, to present themselves for a formal police inspection. This system of official indictment led further to a change in the mode of evidence; since, as against the official indictment, compurgators and duels were out of the question, and seeing that the ordeal, in consequence of the decrees of the ecclesiastical councils, had fallen into disuse after the year 1219. A new procedure is thus introduced into the practice of the courts; according to which the defendant is asked whether he is willing (in the place of the ordeal or duel) to submit to the decision of his community (*patria*). If he submits, the definite question is laid before the jury, “*an culpabilis sit, vel non.*” Originally this might be the same presenting jury which had pronounced the *indictatio*, but the defendant was allowed a right of challenging individual jurors, by which means a new jury was formed. In the following period this becomes the legal rule; the defendant can always demand the empanelling of a new jury, which now, as a petty jury, definitely delivers its verdict of “guilty,” or “not guilty.” As the indictment jury proceeds from the decrees of Henry II., so also from the practice of the courts under Henry III. was the verdict by “*jurata*” developed. (3)

(3) The development of the presentment duty of the hundreds and parishes is, as a rule, referred to *Æthl.* III. 3, which treats of a presentment

pronounced by the twelve Thanes in the hundred, but which was not long retained in this shape, and which perhaps never was carried out at all. This can

IV. The keystone of this police-system was the transformation of the *turnus Vicecomitis* into an office for examination and police-court, and the origin of the courts leet, co-ordinated therewith. Owing to the circuits of the judges, and the increasing centralization of the criminal trials, the county courts became lower courts for criminal cases, with which the newly formed system of presentments could be practically combined. From the thirteenth century onwards the *turnus Vicecomitis* appears a very effectual mode of bringing to the higher tribunals the official indictments of the hundred for serious criminal offences. At the same time the *turnus* remains a criminal court for petty offences, the number of which increases with each generation, in consequence of later ordinances, especially of those touching weights and measures, bread, beer, and wine. The summons of the hundreds for the discharge of such unpopular business, and the extortion inseparable from the office of sheriff, render the tourn a periodic public grievance. The sheriffs and their bailiffs, who were often changed at short intervals, often failed to bring with them the local knowledge necessary for such

be explained in the same way as on the Continent, in the post-Carolingian period. As a constant and firm direction of the procedure by royal officers was wanting, the new institution decayed; and continued (as on the Continent) only in a crumbling form, as a presentment in smaller communities; and of this we find traces as in Cnut. II. c. 30. "And if a man of the hundred is so faithless, and is so often accused, and three men together accuse him, there remains nothing for him but to go through the threefold ordeal" (see *Leges Will.* c. 51). The Norman system of presentment that was now being received arose from the new administrative system, which with its Norman officials standing face to face with a foreign and hostile population, was obliged from the first to have local statistics verified by persons appointed and sworn in for the purpose. It is a disputable point whether the *inquisitio* of the *Vicecomites* or that of the justiciaries was the earlier. But this new institution only became permanently effective after there had been found in the royal justiciaries in their capacity of emissaries, the instruments for conducting such a system of presentment. The connection of the "petty jury" with this system, after the abolition of the ordeal, is shown in the voluminous literature on the origin of trial by jury; before all by H. Brunner,

Biener, and Forsyth. The necessity of putting the question to the *indictatus*, whether he was willing to subject himself to the judgment of his community (*patria*), is undoubtedly due to the fact that the new procedure could not be called a "*judicium parium secundum legem terre*." According to the one opinion which is repeatedly expressed by Braaten, an obligation to do so took the place of the former obligation to submit to the ordeal. Here, as there, a "*tenetur*," "*compellitur*," "*cogendus est*" was inferred, by virtue of which the refusing party "*indefensus et per hoc quasi convictus remanebit*." Accordingly the full penalty was imposed in *contumaciam* upon the person refusing. But the matter was still doubtful. The new procedure was no *judicium*, as was assured shortly after Magna Charta. Only where the accused gave his express sanction to the proceedings, did a deviation from the customary mode of proof appear unobjectionable. But to obtain this acquiescence coercive measures were considered right, a "*prison fort et dure*," yet without bloodshed and bodily injury, in order to adhere strictly to the letter of Magna Charta. In the year 1275 this was approved, and the new procedure generally directly sanctioned by the statute Westminster i. c. 12.



work. Hence, among thickly populated districts, a tendency became manifested to form for themselves a separate jurisdiction for these summonses of the whole male population (which now were pre-eminently called popular courts, "courts leet"), and by taking this burdensome business upon themselves, to be at least quit of the extortionate magistrate. Through royal concession the bishoprics and abbeys were the first to succeed in doing this. In return for considerable money payments it was from the time of King John granted to numerous burghs. But it was also the interest of smaller hamlets and manors to form their own court districts, in which a manorial magistrate was now felt less oppressive and was less hated than the extortionate *Vicecomes* and his under-bailiffs. The lord of the manor had the same interest, and was quite as much inclined to exchange the old limited criminal jurisdiction of the court baron, which had become odious to him, owing to the continual interference of the *Vicecomes* and the ever-recurring penalties for alleged transgressions, for a royal concession, which granted him a police jurisdiction to the extent of the sheriff's-turn. The power thus granted was more extensive than the ancient manorial jurisdiction; it had definite limits, and could not be disputed. In the course of time this change was made in such numerous instances among the old manors that a court leet became almost a regular accompaniment of every court baron. Private leets were now distinguished from the public leet of the sheriff. Nevertheless the private leet is merely a manorial court by grant, an emanation from the royal prerogative jurisdiction, a court of record, which in the King's name summons all the tenants to suit of court (*secta regis*, suit royal); whence also the non-appearance of those bound to suit of court may not be arbitrarily remitted by the manorial lord. The object of the grant is the right to hold police-court sittings (*tourn*) for a smaller district, to exact fines and taxes (*amerciements*, fines, *ersoign-pence*), and generally, too, a small court-fee (*certum leta*, cert-money). The lord of the manor is only entitled to the profits of the court; but the court belongs, in legal language, to the King; "the day is to the King." The holder of the court, the steward, represents the person of the King, and must have the judicial qualification of the sheriff in the *tourn*, and hence the lord of the manor most probably cannot himself hold the court. For non-user, improper summoning, or negligent administration, the Crown can suspend the leet, sequester it, or definitely recall the grant; the vacant jurisdiction then lapses to the sheriff's-turn. The local police-court is a branch of the sheriff's-turn, and has accordingly a similar jurisdiction over offences, which are

punished according to the common law and the customary system of regulations, or which, according to the newer fines, are referred to the leet, but not over *placita coronæ*, which may only be inquired into as in the sheriff's-turn, and where the public accusation may only be laid by indictment. It is, therefore, to use a modern expression, an "office for examination" and a police-court combined. (4)

(4) With regard to the origin of the local police-courts, *courts leet*, see, for a more detailed account, Gneist, "Geschichte des Self-government," 90, 91, 100-108. The court baron had only a limited right of execution, and no jurisdiction over the police fines which the royal ordinances had introduced (*amerciaments*). The lord of the manor also, who wished to have an effectual police-court for his manor, was obliged to obtain the royal grant of a court leet, which in process of time became the rule. The manorial elements appear also here overshadowed by the higher judicial and police control residing in the Sovereign. But the possession of a manor is not a necessary condition. Sometimes also a court leet is granted for a village or a single house. Like the church advowsons in England, the leets became often separated from the estates, and were separately inherited. The procedure before the leet is in the present day a mine of wealth for judging of the procedure in the local courts of the Middle Ages (of the chief authority, Scriven on Copyhold). The ordinary court days are held twice a year, in the first month after Easter and Michaelmas. The committees who assist at the finding of the verdict are in later legal language called "juries," but only in the sense of "juries of inquiry," just as in the sheriff's-turn. The duty of attending court is not a consequence of a manorial right, but a duty incumbent upon all subjects, royal suit of court (*suit real*), and must accordingly be paid in person (with exception of the lords and clergy, as provided in 52 Henry III. c. 10). From the number present, the parish committees are next appointed. In the sheriff's-turn in later times only suitors of twenty shillings yearly arising from freehold or twenty-six and two-thirds from copyhold were to be appointed to form the committee (1 Rich. III. c. 4); but this provision only dates from the end of the Middle Ages, and was not (by analogy) applicable to the private leets. The formation of the court leet is completely detached from feudal

principles, seeing that suit of court has no connection whatever with real estate, but is attached to the fact of residence, and according to the strict letter extends to all persons between the ages of twelve and sixty, if they have been resident within the jurisdiction of the court for a year and a day (Scriven, ii. 823, 824). Under the manorial steward there exists a bailiff, whose duty it is to summon to the court day those bound to suit of court. This under-officer has also, alone and without the interference of the steward, to select and summon the jury (Scriven, ii. 837). The steward opens the court, which, as in all royal courts of law, is proclaimed by the bailiffs crying out three times, "Oyes, Oyes, Oyes." Then follows the constitution of the "leet jury," of twelve to twenty-three persons, which in many leets remains a whole year in office, in others is newly formed every court day. In lighter criminal cases, the court leet can pass sentence and inflict the penalty, by fine, *amerciament*, and lighter punishments provided by special laws. Such cases are, as in the sheriff's-turn, frays, offences against the beer-house regulations, disorderly houses, false weight, offences against the police regulations for bakers, brewers, butchers, and other trades, neglect to mend the roads, failure to do suit of court, refusal to undertake parochial offices, etc., the general object being the maintenance of the public peace and the removal of public nuisances. After the passing of the sentence (*in misericordia est*), the adjustment of the police fine, "affermment of the *amercement*," is made by two or three valuers, who, in later times, in accordance with the fundamental rules of Magna Charta, must be appointed from among the *paries*, and very frequently from among the jury themselves. The measure of the money-fine cannot be further called in question, for the writ "*de moderata misericordia*" is only applicable to courts "not of record" (Scriven, ii. 852, 853).

V. Hand in hand with this newly constituted tribunal goes the development of a summary procedure in criminal cases, which first gave to the police regulations their full efficiency. As early as the Anglo-Saxon times we hear of a penalty for an offence against discipline, for disregarding the King's commands (*oferhrynes*), which is paid with 120 shillings. (Edw. II. 1, II. 2.) In the *Leges Hen. I.* a similar disciplinary punishment as a penalty for neglecting the royal commands, *overseunessa regis*, is repeated and extended to further cases. The Norman feudal system brought with it a penal system as a portion of its military discipline, which the military commander carried out by inflicting feudal fines (*emenda*) upon movables. Under the name "*misericordia*," "*merci*," this is also known to the Norman jurisprudence, but is apparently of little importance. But since, in England, the whole body of landed proprietors have become the king's *homines*, this fact enabled a criminal jurisdiction for breach of discipline to be deduced to its fullest extent, which was sometimes applied to the old case of the overhrynes, and at others extended to new cases. In the ordinary way this was brought about by a double act: (a) by a Judgment of the Court, which declares the guilty person with his movables forfeited to the King's mercy: "*in misericordia regis est de pecunia sua*," that is, he is guilty of an offence and liable to a fine;—(b) by an Act of Execution, by which, according to the rank of the owner, the forfeited property is taxed and charged with a fixed sum of money, "*admensuratur*," "*adforatur*," and when thus determined this sum is called an "*amerciament*." This last proceeding was a consequence of the Norman financial principle which in order to render a complete valuation practicable, reduces all natural payments, including also forfeited movable property, as far as possible to money payments. \*\*

\*\* The connection between the Norman system of amerciaments and the Anglo-Saxon law can be seen in the following links:—

(a) The Anglo-Saxon official penalty inflicted on the royal gerefa for neglecting his definite official duties, appears in *Athlst. I. sec. 5*. This is especially threatened, where an unjust judgment has been pronounced (*Edw. III. 3*); in case of corruption (*Athlst. V. 1. sec. 3*); for failing to attend the court day (*Edw. II. 7. 8*); for neglecting to exact penalties (*Edw. II. 2*); for neglecting official duties connected with the preservation of the peace (*Athlst. II. 26, pr. v. 1, sec. 2, VI. 8, sec. 4, etc.*). Seeing that any opposition to these disciplinary punishments would, as a rule, certainly

have brought about a deposition from office, a summary proceeding could readily be employed in such cases.

(b) A further system of the "*overhrynes*" is extended as a disciplinary punishment also to subjects, who neglect definite court and police duties, especially neglecting the suit of court (*Athlst. II. 20*); neglecting the summons to apprehend the disobedient and to pursue peace-breakers (*Athlst. II. 20, sec. 2, VI. 7; Edw. II. 7*); for infringing the police regulations by engaging a servant, before he has received a certificate of dismissal from his former master (*Edw. II. 7; Athlst. II. 22, V. 1; Edw. III. 3; Cnut, 28*); and also for non-fulfilment of a judicial sentence, for purchasing outside the privileged

The practice of the Exchequer has here again blended Saxon custom and Norman feudal law together in a manner that seemed most advantageous to the finances. The disciplinary punishment no longer takes the form of a fixed sum, but is graduated according to ranks; for the upper classes more, for the poorer classes generally less, than 120 shillings; according to the probable worth of the movable property. The official fine imposed upon a *gerêfa* who is liable to be deposed, which in clear cases of neglect of duty had been already inflicted in Saxon times *brevi manu*, had now come to be extended to all vassals, and even to the *libere tenentes*, with respect to the performance of their court duty (*secta regis*). An appeal to a judgment of court appeared, on the other hand, a very dangerous experiment, since the royal steward appoints the judging lawmen, and the fine was proportionately raised where there had been a show of defiance.

Thus the amercement-system soon followed the arbitrary system of the administration. The untrustworthy, disunited composition of the courts of justice under the Norman præfectural system is the real root of the encroaching police control. The person accused generally forthwith declares himself "*in misericordia regis*," and the fine is now fixed in the Exchequer by the lower officials; higher fines by the superintending officers. In the most important and complicated cases a special commissioner was sent into the country to make the rating, and he rated the men of the county or hundred by the poll. The blending of the *emenda feudalis* with the Anglo-Saxon law accordingly brought about the following changes:—

1. The right to the amerciements is now established in

markets, and the like. The penalty is in all cases 120 shillings. The *Leges Hen. I.* adopt this customary law under the name of "*overseenessa*" (*Hen. I.* 34, sec. 3; 35, sec. 1; 36, 38, 41, sec. 1; 48, sec. 1; 51, sec. 7; 52, sec. 1; 53, sec. 1; 60, sec. 1; 80, sec. 9; 81, sec. 2; 8, 87, secs. 4, 5). It is expressly mentioned that the old fine of 120 shillings is according to the present value equivalent to 50 shillings. But as the Norman feudal law is everywhere grafted upon Anglo-Saxon custom, so now the feudal maxim, which gives the lord the right of levying fines on movable property, coincides with it.

(c) The newer system of feudal fines is put into force as a natural attribute of the royal lord. There were, as it appears, no express decrees issued with respect to it; the system was rather

introduced in the practice of the Exchequer in the manner described in the "*Dialogus de Scaccario*," ii. c. 16 (*Madox*, ii. 439): "*quisquis in regiam majestatem deliquisseprehenditur, uno trium modorum juxta qualitatem delicti qui regi condemnatur* (1) *aut enim in universo mobili suo reus judicatur pro minoribus culpis*, (2) *aut in omnibus immobilibus, fundis scilicet et redditibus, ut eis caheredetur, quod si* (3) *pro majoribus culpis aut pro maximis quibuscunque vel enormibus delictis, in vitam suam vel membra.*" The "*Dialogus*" then refers to the first case: "*cum igitur aliquis de mobilibus in bene placito regis judicatur, lata in eum a iudicibus sententia per hæc verba: Iste est in misericordia regis de pecunia sua: idem est ac si de tota discessent.*"

favour of the under-tenants also, as against their under-vassals, and is graduated according to the feudal degrees, for the Eorl, and for the baron or Thane (Hen. I. c. 85, 87). Hen. I. c. 41 contains the express assurance: "*unusquisque dominus plenam overseuinessam suam habeat secundum locum et modum culpæ de homine suo, et qui sunt ejus super terram suam.*" (1)

2. The new amerciaments are no longer raised in fixed sums, but graduated according to the probable amount of the movable property, that is, according to rank. It appeared now as a royal favour (*merci*) when the guilty party escaped with the payment of a sum of money, less in amount than his entire *catalla*. In the strictness of law, the whole of the movable property is forfeited, "*est in misericordia regis de pecunia sua idem est ac si de tota dixissent.*" The rating "*adforare*" in the Exchequer appears as an act of mitigation by a court of equity. (2)

3. The number of cases for fine knew no limits now that, going beyond the Anglo-Saxon custom, every act of disobedience against royal decrees was brought under a fine, and thus a mode of compulsory proceeding was initiated, for the purpose of carrying out all possible decrees. Already the Leges Hen. I. c. 13 give a varied list: "*quæ placita mittunt homines in misericordia regis,*" but in which criminal penalties and police fines are mingled together. (3)

4. Submission to the *misericordia*, or the ordinary procedure

(1) This new law is partially identical with the older, according to which the Ealdormen, Shire-reeves, and lords of manorial courts uphold their official authority by the infliction of small disciplinary punishments (Hen. I. 84, sec. 4; 85, sec. 1; 41, sec. 1; 53, sec. 1; 87, sec. 5), corresponding to the disciplinary penalties which were formerly paid to the Eorl and the hundred (Cn. II. 15, sec. 1). This "*misericordia Vicecomitis*" and of the private feudal lords, however, plays a very unimportant part in the Exchequer accounts, because it was not, as a rule, a subject for the rendering of accounts, and with the decay of the county and private courts, it is intelligible that the importance of the amerciaments of the Courts of lower instances should sink also.

(2) We find here also connecting-links with the Anglo-Saxon custom, which for certain offences adopted the forfeiture of movable property. In like manner, in the spirit of the ecclesiastical administration a rating is proportionate to the property of the offender, as is laid down in Athl. VI. 52, "and

always, as one is of the mightier men here in the world or through dignity higher in rank, he shall be punished the more severely for his sins, and pay higher for every wrong he commits, and therefore one shall modify and carefully distinguish rich and poor, and every class, in ecclesiastical as well as in secular penalties." The first assurances of a mitigation of the arbitrary amerciaments in the Carta Hen. I. 1, sec. 8, are accordingly easy to understand: "*si quis baronum vel hominum meorum forisfecerit, non dabit vadium in misericordia totius pecunie sue sicut faciebat tempore patris mei; sed secundum modum forisfacti ita emendabit sicut emendasset retro—in tempore aliorum antecessorum meorum.*"

(3) A list of fifteen heads of amerciaments is given by Madox (i. 528); a shorter and incomplete one by Hardy (Rotuli finium, p. xvii. et seq.). The number may be conjectured by this fact, that in later times fifty Rotuli were once laid at one time before a Baron of the Exchequer for the purpose of rating them (Madox, ii. 65, 66).

of the court, are matters of free choice. The previous decision "*in misericordia est*" still, according to the "*Dialogus de Scaccario*," in case of dispute, admits of the demand of a judicial sentence. Since even in the Saxon period the fixing of official fines as regards the King's personal officials doubtless took place *brevi manu*, the Norman feudal system brought all vassals into a similar dependence upon the King, which made an appeal to the courts of justice somewhat impracticable. (4)

Hence the Norman king became possessed of an arbitrary penal jurisdiction, such as probably no other potentate of the Middle Ages ever possessed. The difference between it and the old system of penalties consists in this, that the existence of the offence and the suitableness of the penalty inflicted is no longer determined by the finding of the community, but by the personal will of the lord or his deputy. It is no longer a question of the jurisdiction of the tribunals limited by custom, but of an arbitrary police and disciplinary control, the influence of which upon the form of the English constitution has not been sufficiently estimated. The application of the same for the purpose of carrying out and extending the Anglo-Saxon police regulations has been already indicated. The numberless remaining instances furnished by the Exchequer accounts can be summarized under the three following points of view.

I. The system of amerciaments serves in many ways to supplement the criminal law. The cases mentioned in the Exchequer accounts are—the lending of money and weapons to the King's enemies, refusal to work upon royal castles and bridges, the imprisonment of royal servants, insulting royal officials with abusive language, the withholding of goods belonging to another, etc. A special enumeration of offences is out of the question, as the *misericordia* is very frequently mentioned without the reason being given. A separate province is occupied by the "*misericordia de foresta*." Whilst the more serious forest-offences are threatened with penalty of limb or life, the more trivial ones, such as neglecting to mutilate dogs to prevent their hunting, are left to the King's *misericordia*. The secular magnates, bishops, abbots, and others have to pay amerciaments of five hundred marks, a hundred pounds in silver, and similar sums, in cases where men of lower degree would have forfeited limb or life. The general heading "*infractio pacis*" and "*contemptus breccium regis*" was of such wide scope, that at last every royal order

(4) An appeal to the Anglo-Saxon laws, that is, to the ordinary forms of the court, became a very dangerous experiment, seeing that guarantees for a just sentence against the offended

lord were very few. The "*Dialogus*" indicates this clearly enough, l. c. 8: "*Regi, cui militatur, in pecuniâ reus judicabitur, nisi festinaverit postulante misericordiam prævenire judicium.*"

could be enforced by amerciaments. In a still greater degree was this the case with the ordinances which were later issued with the advice of the estates of the realm. Offences against these, as "breach of assize," in default of special penalties, fell under this heading. Hence the innumerable amerciaments on account of dispossession of estates (*novell disseisin*), which we find enforced especially against abbots, and secular grandees, their clerks and esquires, and which become the basis of an effective system of real actions and a new theory of possession.

II. The system of amerciaments serves also to maintain the authority of the courts against disobedience in the widest sense (*default, non-appearance*), even against female wards, who do not present themselves, in answer to a summons to marry; neglect to prosecute a suit, quitting the court without leave, unauthorized compromise (*concordia de pace regis sine licentia regis*), irregularities in evidence, refusal of the duel, failing to appear in the lists, or admitting one person to two duels in one day or, "*quia posuerunt hominem ad aquam sine warranto, sine visu servientium regis*," etc. Where in later times committees of the community are appointed to take evidence, an amerciament is imposed where incompetent men are brought "*pro rusticis adductis ad faciendam juratam; quia elegit rusticos ad assisam; quia recepit hominem ad juratam qui non fuit de hundredo*;" it is inflicted upon such as speak to the jury; for false witness and false judgment; for an improper execution of the sentence, "*pro latrone suspenso sine visu servientium regis*," etc., against sheriffs and provosts for improper distraint and the like. Hence arose a method of carrying out reforms in the procedure of the courts by means of simple instructions from the Crown.

III. The system of amerciaments serves also to protect royal privileges against the pretensions of private persons; e.g. the illegal raising of tolls, the unlicensed appropriation of the royal prerogative (*purprestura*), pretensions raised respecting public roads and rivers; and generally as an effectual measure against the exceeding of powers of jurisdiction. Thus W. de Friston is fined for passing judgment on a robbery in his court; "*milites Curie Comitatus de Coupland, quia fecerunt judicium de placito, quod non pertinuit ad eos*." In addition to this interminable system of fines there is still the right of sequestration (the *capere in manum regis*), which is also deduced from the fundamental principle of the feudal grants, often taking effect on very trivial grounds. To what extent sequestration was made use of against magnates, for defaults in the Exchequer, or for not putting into execution the royal decrees, etc., is shown by numerous recorded cases. Thus,

the city of London was once taken into the hand of the King for a "trespass of the assize," and its *custodia* was entrusted to a commissioner.

The executive power of the Norman kings has been shown in a former chapter; this police control exhibits their legal power to maintain peace and order in the country, and the effectual means of authority residing in the sovereign as against his officials and the greatest magnates in the land, and even against the Church. Numberless entries on the Exchequer rolls show how this controlling power extends over persons, communities, and corporations, over spiritual and temporal dignitaries, over the greatest magnate as over the humblest peasant; over the entire population of counties and hundreds, legally unlimited in the number of the cases as in the amount of the fines. The exemptions only refer to the duty of contributing to the ordinary police-fines of the county (common amerciaments), from which the royal demesnes, the property of the Queen, of the higher officers of the Treasury, and by special privilege also of certain magnates, were exempted. The revenues derived from the royal amerciaments are in very rare cases granted to private landowners, such as the Bishop of Bath, and in such cases they are fixed by the King, collected by the royal officials, and the amounts cashed by the grantee at the Exchequer. (Madox, ii. 66.)

The power of the amerciaments has now become the proper instrument for enforcing police regulations and royal orders in every other province. Under this system it first became possible to put the royal ordinances in the place of the older legislative resolutions of the Witenagemôte, and in this manner to restore the mechanism of an absolute government by ordinances with administrative execution. Originally this police system of fines was probably founded upon practical necessity. The insolence of the "*Francigenæ*," the martial inclination to violence, the wrangling of the Normans among themselves and with the Saxon Thanes, rendered absolutely necessary that strict military discipline for which historians laud the Conqueror. But after a few generations (as in the modern police-organized State), the other side of the picture becomes apparent, namely, the extremely arbitrary working of the system with regard to the lower ranks and the defencelessness of the subjects against any abuse of it. It is evident how disagreeable to landowners and corporations a jurisdiction under such a system must have become, if they exceeded their authority, and even in its mere exercise. The smallest error made in respect of the forms and limits of their jurisdictions and franchises exposed them to arbitrary punishment and sequestration of their



possessions, on the ground of trespasses, contempts, defaults, and false claims of all kinds. It is a marvellous contrast to the condition of things on the Continent, when in England we continually find great estates and great cities under sequestration on account of the official offences or oversights of their bailiffs, for quitting the royal court without licence, and for neglect of the royal commands, and so on. It is also manifest to what arbitrary action of the government both person and property were here subjected, and how later it came about that the first aims of Magna Charta were to secure the fundamental rights of the subject by bringing the amerciements within the pale of the law: "*Comites et barones non amercientur nisi per pares suos, et non nisi secundum modum delicti; liberi homines, non nisi per sacramentum proborum et legalium hominum de vicineto.*"

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## CHAPTER XIII.

### IV. The Development of the Norman Finance Control.

FOLLOWING on our account of the revenue of the Anglo-Saxon kings, the financial system in operation at this time may also be distinguished under the following heads.

1. *Revenue immediately derived from the royal demesnes*, newly founded after the Conquest by an extensive reservation of demesnes and forests, increased by the frequent lapsing of fiefs. The older payments in kind reserved from demesnes and Folkland were from the time of Henry I. turned into money payments, after the fashion of the financial administration of modern times. There still linger on some remains of usufruct in Folkland, the minor Crown rights relating to treasure-trove, wreckage, and derelict goods; as well as the ancient duties payable on wool, sheepskins, and leather (*customæ*).

2. *Profits arising from the royal authority* :

From the military power arose the right to the services of the inhabitants in building bridges and castles, now effectually enforced by summary amerciements. But this old source of profit was far exceeded by the new income arising from the feudal law through reliefs, wardship, and marriage.

The fees and fines arising from the exercise of judicial power now poured in abundantly owing to the centralization of the

more important actions at the court. Equally productive was the extensive right of forfeiture for felony, and the cases of confiscation of movable property.

Finally, the revenue arising from the police power, flowing in abundantly owing to the unbounded number of police amerciements.

8. *Beginnings of direct taxation*, including :

The *auxilia*, or aids of the Crown vassals, but only in three fixed and certain cases of honour and necessity.

The *scutagia*, shield moneys, since the time when, under Henry II., the acquittance-moneys for the feudal military service begin.

The *tallagia* from the inhabitants of the towns and the country not liable to any feudal service ; taxes which, as the inseparable concomitants of the feudal system, were introduced into England also.\*

The first glance shows us at once that the new income far exceeds all the old sources of royal revenue. The Norman administrative system is keen in developing in a fiscal direction every department of State ; the undefined arbitrary administration pervades all departments with its endless system of police fines and dues, amerciements and fines, in a manner which defies every method of arrangement. By becoming centralized in a royal treasury the financial system assumes a new appearance, and following the Exchequer documents, Madox, the great authority on the history of the financial system, draws up the following seven heads, under which all such details are to be included as illustrate the spirit of the political administration.

I. *The Royal Demesnes and Forests*. These are originally formed of the manors, lands, parks, and forests (*ancient demesne*), more than a thousand in all, which Domesday Book enumerates—constantly increased by lapses and confiscations, but also diminished by new grants, and sometimes by lavish waste. Only a part of the demesnes, especially in the neighbourhood of the King's residences, stood, as a rule, under the direct management of the King, that is, of his court officials and personal servants. Those scattered about in the country were included in the *corpus comitatus*,

\* For the financial system of this and the following period the authorities are : Madox, "The History and Antiquities of the Exchequer of the Kings of England" (2 vols., London, 1769), from which I have here quoted. For the Middle Ages, Sinclair, "Hist. of the Revenue" (3 vols., 1803, 1804) ; and Cunningham, "Hist. of Customs and Subsidies, etc." (1764), are not of

great importance. Other authorities of value are the Treasury Rolls printed in later times by the Record Commission, Hunter, "Magnus Rotulus" (1833) ; Hunter, "Great Roll of the Pipe," for 1155-1158, 1189-1190 (1844) ; Rotulus Cancellarii de 3 Joh. (1833) ; Hardy's Rotuli de Libertate regn. Joh. ; Hardy's Rotuli Finium.

and therefore occur again under the farm rents in the counties. (1)

II. **Fiefs lapsing by the frequent cases of Escheat and Forfeiture.** When, at a later period, England and Normandy became disconnected, the possessions of the Norman lords in England, and of the English in Normandy, were to a great extent confiscated. So long as such estates remain *in manu regis*, they form a portion of the demesnes, with the ground-rents, reliefs, wardships, and rights of marriages appertaining to them. The earlier sub-vassals have now become vassals of the Crown—not of the King as such, “*ut de corona*,” but of the King as possessor of the lordship, “*ut de honore*.” The greater estates of this sort are given over to special tenants (*fermors*), or stewards (*custodes*); towards the end of the reign of Henry II. they form a special demesne department or Escheatry. Only the smaller escheats are in later times made over to the sheriff, to a separate account. When a bishop’s see or a monastery became vacant, the Treasury also insisted on the vacant fees being treated analogously, and appropriated the revenues until it was again occupied. For this reason William Rufus left the Archbishopric of Canterbury and other bishops’ sees unfilled as long as five years. These temporalities were at first managed by special *custodes*, and later by the Escheatry. (2)

III. **The Feudal Perquisites: Reliefs, Wardships, and Marriage.** The *relevia* are at first arbitrary; from the time of Henry II. they are fixed in the case of single knights’

(1) The royal demesnes are given, by Cowell and others, as 1422 manors, 90 chases, 781 parks, 67 forests. Considering the constitution of Domesday Book, however, discrepancies are easily explainable. As to their formation out of the possessions of King Eadward and the family of Godwine, and from remains of the Folkland, etc., see Ellis, *Introd.*, i. 228, 229. Instead of the usual term, “*terra regis*,” we find in Eton Domesday Book, the more exact expression, “*dominiatus regis ad regnum pertinentens*.” The obligation of all landed estates to military service had also reacted upon the right of the royal demesnes. According to a legal view proceeding therefrom, the real property belongs to the King by virtue of the right of the Crown, and descends to the heir to the throne as such, even when the land has been acquired by the King in his private capacity, or inherited from an ancestor, who never wore the crown (Comyn, *Digest*, Pre-

rogative, D. 64; Allen, “*Prerogative*,” 154, 155). In like manner the principle of the inalienability of the military fief reflects upon the Crown. As the feudal tenant must leave his ancestral estate to his firstborn, and can only dispose of newly acquired property, the later parliaments were inclined to treat the alienation of the “*ancient demesne*” as an irregularity; frivolous squanderings were, on demand of the assembly, recalled by “*acts of resumption*.” As to the change of the payments in kind, which still occur, into money payments to the Crown, see Madox, i. 272.

(2) The lapsing of fiefs was manipulated for financial purposes all the more, as the first Norman kings seldom inflicted punishments of life and limb upon their Crown vassals. They exercised with all the more severity their right of sequestrating and confiscating the Crown fees.

fees at five pounds in silver, or 100 shillings; for groups of knights' fees, forming a lordship, after Magna Charta, 100 marks are paid; for the lordship of an Eorl £100. The profitable wardships were often made over to the vassal of the Crown who bid highest; the dues paid in respect thereof, in the case of great fees, often amounted to several hundred or thousand marks in silver, in one case even to as much as 10,000 marks. Still more various was the financial practice touching the marriage of male and female wards. Thus, for instance, Geoffrey de Mandeville pays 20,000 marks for his marriage with Isabella, Countess of Gloucester, and for the possession of her lands (Hardy, Rot., xxx.). The varied marriage dues are directed to such ends as these; "*ut rex concederet ei ducere uxorem; ut ducat uxorem ad velle suum; ne capiat virum nisi quem voluerit;*" Lucia Comitissa Cestrie pays 500 marks, "*ne capiat virum infra quinque annos*" (Magn., Rot., 31; Hen. I.); Gundreda Comitissa 100 pounds in silver, "*ne maritetur invita;*" Alicia Comitissa Warewic, 1000 pounds, and ten palfreys, "*quod sit vidua, quamdiu sibi placuerit, ita quod per regem non esforcietur ad se maritandum, et pro habenda custodia puerorum suorum*" (7 Joh.); R. de Seinsperia, on the other hand, pays nine pounds in silver, "*quia renuit filiam Hasculphi Musard.*" (3)

IV. The Rents of the *Vicomites* and *Fermors* in the Counties. These comprise local revenues of all kinds, arising from demesne, dues, fees and forfeitures, and small royalties; which, in the interest of the financial administration, are massed together under the head of "general farm." Where, in the place of a farmer, a *custos* administers, he must render

(3) The reliefs of the individual knights' fees were already at the time of the "*Dialogus de Scaccario*" (ii. c. 10) fixed at 100 shillings (Madox, ii. 426). The reliefs of greater estates are in the "*Dialogus*," ii. 24, still *ex bene placito*, and only in later times fixed at 100 marks for a barony (Madox, i. 318); the line between the two has been evidently drawn by the practice of the Exchequer. The practice of the profitable feudal wardship will appear from a few examples: Will. de St. Marie Church pays 500 marks for the wardship of R. Fitz-Harding, "together with his whole inheritance, knights' fees, female marriage," etc.; Simon de Montfort even pays 10,000 marks for the "*custodia terrarum et heredis*" of Gilbert de Anfranville until the majority of the heir, "with marriage, church patronage, knights' fees, and other appurtenances and vacan-

cies." In frequent cases the wardship appointments are again recalled, because afterwards a person has been found who offers more (Hardy, Rot., xxxi.). Still more multifarious are the instances collected by Madox and Hardy as to marriage. I may here remind my readers that the relative value of money in the eleventh century is generally fixed at ten times that of the present day. The owner of a small English knight's fee pays accordingly at each change of possession, 100 shillings =  $7\frac{1}{2}$  marks = 100 thalers, in silver value equal to about 1000 thalers of our money; the possessor of a greater lordship, 100 marks, or about 13,300 thalers of our money. The maximum value of a wardship might amount to 10,000 marks; the value of a feudal marriage even to the double of that.

a special account, and deliver up the surplus after deducting the expenses of management. (4)

V. *The fines and Amerciaments*, the latter of which have been already explained under the system of police administration. The fines are royal dues in the widest sense of the term, and are just as characteristic of the system of this administration as the amerciaments with which they are often confounded. The position of the King led to a number of arbitrary powers, or circumstances, under which he could either grant or deny. It appears here to be an unchangeable maxim that nothing which can be refused is granted without a money payment; a maxim, the reminiscence of which enters even into the administrative system of the present day. The people of that time appear to have felt this system more as a burden than as an injustice; for the King had the formal right to act as he did; he proceeded in the same manner in Normandy, and the Norman lords vied with the Exchequer wherever they could. The endless list of fines can be grouped, in some measure, under three or four chief heads:—

1. *Fines for Liberties and Franchises*. The right of the landowners to hold feudal and manorial courts was often of doubtful origin, and the extent of the jurisdiction also might be called in question. The deficiency was then made good by a fine. For instance, Lucia, Countess of Chester, paid 100 marks for the privilege of pronouncing judgment in her Curia between her vassals (Madox, i. 397, 398). Certain counties under Henry III. obtain in this manner their own right of election, that is, the right of nominating their own sheriffs. In like manner the men of Devonshire pay twenty-three and a half pounds in silver, and the freemen of the counties of Dorset and Somerset similar sums, for leave to choose their own sheriffs (Madox, i. 417 *et seq.*). In this manner the towns obtain the beginnings of self-government: London pays a hundred marks for the privilege of choosing its sheriffs (81 Hen. I.); Carlisle ten marks for electing its coroners; Cambridge three hundred marks in silver and one mark in gold for leave to have its own *firma* and exemption from the interference of the sheriff of the county; Lincoln two hundred marks for *firma burgi* and a single immunity from *tallagium*. Sometimes exemptions, immunity from *tallagia*, disforestings, and the like, were permanently granted

(4) The rent (*firma*) of the sheriff is only a collection of the middle and small revenues which were to be raised within the bounds of the county, or the special farm district. Even the earliest Exchequer accounts of 81 Henry I., contain rents of 400 and 500

marks, which prove how extensive the jurisdiction of the county court must have been at that time. As to the regulations affecting the individual accounts in the *firma Vicecomitibus*, see Thomas, "Exchequer" (51).

upon a high fine being paid; but then fresh dues were paid for the renewal and confirmation of such immunities, especially under a new government.

2. *Fines in Actions at Law.* From the time of Henry II. these were unlimited. The King grants permission for suits to be brought in the Royal Supreme Court instead of in the defective county courts, and at the same time for an improved procedure in taking evidence (*recognitio*, jury), but only on payment of fees. Hence the innumerable fines, "*ut haberet justitiam et rectum*;" that is, the permission to bring the action at court instead of in the county. Each single writ is sold, sometimes even with special sums in the event of success. Every step in an action, entering one court instead of the other, notably every inquest by jury, presupposes a fee. Thus, R. de Luci pays fifteen marks and a palfrey to obtain an inquisition, "on the oaths of twelve good men," as to what dues and services were owed him by his tenants in Coupland; W. de Mahurdin, twenty shillings for an inquest, whether he holds his land by serjeantry or as a knight's fee. In one case four marks are paid, for substituting in the assize six knights instead of six others alleged to have been bribed. Numerous fines are further paid that the King may "help the plaintiff to his right;" for instance, on one occasion, two hundred marks, that the King may assist to recover a debt from the Jews. More numerous fines still arise to obtain despatch in a matter. Frequently the parties offer beforehand a quarter, a third, or a half of the sum they claim. Sometimes this offer takes the form of a bilateral "*sponsio*," so that either both parties offer a sum, to obtain the same object (concurrent fine), or each of the two wagers upon the opposite issue of the decision (counter-fine). Just as equivocal are the great fines for the King's "favour," protection, mediation, "*ut Rex juvet eum versus N.*;" "*ut Rex manuteneret eum.*" Under John, a stay or delay of the legal proceedings was even granted in return for money: "*Robertus de Amouesdal debet V. marcas pro habendo brevi de protectione, ne ponatur in placitum de aliquo tenemento suo nisi coram Rege vel per breve Regis; et ut sit quietus de sectis et hundredis, et de omnibus placitis et querelis, excepto murthero*" (Rot. 2 Joh.). "*Decanus et Capitulum Londoniæ II. palefridos, pro protectione ne vexentur contra libertates cartarum suarum*" (Rot. 2 Joh.). In criminal matters, also, the rigour of the penalties and amerciaments was frequently mitigated by the previous payment of a fine. The instances generally refer to Norman magnates: "*O. de Lerec debet XX. marcas argenti, ut rex perdonaret ei et Osberto clerico suo malivolentiam suam*" (Magn. Rot., 31 Hen. I.). "*R. c. de CLXX. Marcis argenti, ut rex*

*perdonet ei malivolentiam suam pro filia Geldewini de Dol.*" (Ib., 81 Hen. I.). Further payments were made "*pro habenda gratia et benevolentia regis*," etc. Counties, hundreds, and sheriffs pay sums of a hundred marks for an "indulgent procedure," "for a peaceful hearing," and the like. To these must be added fees for release from prison, or other favours. The Dean of Ely pays one hundred marks for the release of his concubine and her children; the wife of Hugo de Neville two hundred marks for leave to pass a night with her husband. To this category belongs also a fine, "*pro licentia comedendi*." Instead of suffering a sentence of capital punishment, which has been pronounced, permission was sometimes given, on payment of fees, to enter a monastery, "*ut liceat transferre se ad habitum religionis*" (Rot. 5 Joh.).

8. *Fines for concessions of favour in respect of offices, guilds, and dispensations*, notably for persons who on payment of fees receive their father's office, or an office for their relations, or the grant of the office of sheriff, or a special farming at the old farm rent. Even the offices of Chancellor and Treasurer are often granted on payment of great sums as purchase-money. Conversely, fees are paid for release and discharge from an office, or for relief from responsibility, sometimes also "*ut rex faciat computum sine ira et indignatione*." Further, fees for the granting of trade and industrial privileges, especially for the renewal of the *gilds*, for licence to export corn, and so on. After 19 Henry III., and probably even earlier, orders were periodically issued to the sheriffs, "*quod omnes illi, qui de nobis tenent in capite eundem unius militis vel plus, et milites non sunt, arma capiant et se milites fieri faciant*." On payment of fees "dispensations" are also granted; hence the numerous fines "*pro habendo respectu de militia*."

4. *Fines for regranting of Fiefs and for Alienations*. A portion of the Exchequer documents on this subject are printed under the title "*Rotuli Finium*," and contain important dealings respecting the inheritance and alienation of Crown fiefs.

This classification is sufficient to show what a continual source of wealth the fines were to the royal Treasury. Crown vassals made an additional payment in such cases as "*aurum reginæ*." (5)

(5) The fines are arranged by Madox, i. 395, 425, 456, under numerous headings, for which I have substituted a more simple arrangement. Hardy, "*Rotuli Finium*," makes three classes: (1) Fines for the concession and confirmation of liberties and franchises; (2) fines for proceedings in an action, with five sub-divisions; (3)

mixed fines with ten sub-headings. As to the division into voluntary fines or "oblations" and involuntary fines, see Hardy, *Introd.*, xviii. As to money payments for permission to choose their own sheriff in the county, see Madox, i. 416, 417, 420; Hardy, *Introd.*, p. xxix. As to the additional payment of the *aurum reginæ*, Ellis, i. 172.

VI. *Aids, Tallages, Scutages.* (6) In principle the knight's estate is certainly held free from all taxation of villeins, "*quietum ab omnibus gildis et omni opere*," as solemnly confirmed by the charter of Henry I. But the feudal *auxilia* reserved to the King extraordinary contributions on the occasion of the knighting of his son, the marriage of his daughter, and, in case of necessity, for his release from captivity. (a)

The common taxes, *tallagia*, were raised from time to time as need required from royal towns and farmers on the royal demesnes. Although the reorganization of the military system had led to the exemption of the smaller freeholders from the military service and from the burdens of the militia, yet the feudal system deemed it necessary to retain a fair compensation by levying a subsidy in the form of occasional money contributions (*tallagia*). An inseparable concomitant of the feudal system, the *tallagium* ("taille") made its appearance in England with the Conquest; and the strong political development of the feudal system insisted that all classes should be as far as possible proportionately burdened. As, in fact, the old popular army, which existed side by side with the feudal militia, had never been expressly abolished, and indeed from the time of Henry II. had gradually been revived, the practice of the Exchequer dealt with the possessions of farmers and of towns in some degree according to the analogy of the feudal estates proper, by confining the *tallagia* and *auxilia* to cases of honour and necessity, though such cases received a more comprehensive interpretation than where the feudal tenants were concerned. Hence aids and tallages are frequently taken together, and are denoted as "*dona*" or "*auxilia*," or by other more courteous terms. The towns, in order to avert a too rapid return of taxation, often payed voluntary *dona*, "*pro bono adventu regis*," "*pro dono novi anni*," "to conciliate the

(6) The beginnings of a direct taxation are classified by Madox as aids, tallages, and scutages; partly for substantial reasons, and partly because the names in early times are confused. Madox adds also to this group the *custume*, the customary duties on wool, sheepskins, and leather, which I have already mentioned above as ancient sources of revenue. The goods liable to duty were wine, general merchandise, and wool. The old duty on wine was called "prisage," that is, the tenth cask from every ship at the price of twenty shillings. The second customary duty (general merchandise) was, as a rule, in the form of one-

fifteenth or a similar proportion, and was paid as a fee for licence to trade. The toll on wool remained until the reign of Edward I. in a very irregular state. (Stubbs, ii. 523.)

(a) The *auxilia*, aids, were, by right, limited to the three enumerated cases. But as the subfeudaries were fond of extending these cases, and as, in its analogous application to the royal boroughs and demesne villages, the notion was still further extended, there resulted a general tendency to extend the aids to other cases of need, which, after the times of Magna Charta became the beginning of the grant of subsidies by the estates of the realm.



King," and so on, which all flow together with the system of the fines. (b)

The shield-moneys, "*scutagia*," afterwards became still more important. The constitution of the feudal militia, brought over from Normandy, appeared, in the long run, not quite suited to the insular position of England. So soon as the internal affairs were settled, it was no longer a question of short campaigns at home, but of a number of permanent garrisons, and long campaigns against Wales, Scotland, Ireland, and France. For both needs the feudal militia with its short-service system was insufficient. Hence the Norman kings at all times kept a paid soldiery, and allowed some of those liable to military service to buy themselves off for certain campaigns. According to a trustworthy authority, in the second year of Henry II. the prelates were for the first time allowed to pay twenty shillings per fee instead of furnishing a soldier for the campaign against Wales. The first general imposition took place in 5 Henry II., for the campaign against Toulouse, with two marks per fee from all Crown vassals, under the name of "*donum*." In 18 Henry II., for the army in Ireland, partly actual service and partly money payments, under the name of "*scutagia*," were accepted. In like manner in 38 Henry II., for a campaign against Wales, twenty shillings per fee were raised "*a militibus qui non abierunt cum rege*." From this time the imposition of scutage instead of personal service became more and more regulated, payable by all *tenentes in capite* alike "*de corona*" and "*de honore*." The paying Crown vassals are then allowed to raise from their sub-vassals the same sum per fee "*ut haberent scutagia sua*." Occasionally the King raises them

(b) The *tallagia* (Madox, i. 693, secs. 732-751) are a specific creation of the feudal system. The greater landed proprietors, who as a standing army had taken upon themselves the defence of the realm, demanded that those land-owners who were not bound to knights' service should pay their proportionate share in money. The insolence of the armed and war-skilled classes in France designated all the rest as "*tailables*," and from the landlords' point of view as "*corveables*." In England also the "*taille*" was enforced so much as a matter of course, that even the great and powerful city of London, in 7 Hen. III., paid 1000 marks; 26 Hen. III., 1000 marks; 37 Hen. III., 1000 marks, in addition to twenty marks in gold; 16 John, 2000 marks, *tallagia*. The hardship lay in the un-

certainty of the cases and of the frequent recurrence of the taxation. In England two special reasons concurred which gave the classes liable to the "*taille*" a peculiar claim to more equitable treatment. The first was the retention and later revival of the militia by the assize of Henry II.; the "*tailables*" were here never an unarmed class, but, on the contrary, in every generation did good service alike against the rebellious barons and against the Scotch invaders. The other reason lay in the "*firma burgi*;" in order to raise the fee farm rents of the towns in times of necessity, certain towns were promised that their contributions should not be increased, which now furnished a reason for continual claims, and also for disputes as to the amount of the taxation.

immediately by royal order from the sub-vassals *in manum suam*. The raising of the new fee-duty from that time constitutes a new official duty of the sheriff, who, on being appealed to, lends the Crown vassals assistance in exacting the *scutagia* from their under-vassals. (c)

VII. The final heading, *Accidental Income*, embraces treasure-trove, goods cast away by the thief (waifs), wrecks, the movable property of felons, of persons executed, of fugitives, and of outlaws, deodands, and other smaller royalties, which, where they have not been granted to private persons, are for the most part raised and exacted by the sheriff. Dating from the Anglo-Saxon period, the common obligation of the inhabitants to make roads, bridges, and fortresses (*trinoda necessitas*) still continues, as also the foraging of the royal servants on journeys (*purveyance*) which in later times became a standing public grievance. Finally, the so-called "Danegeld," which in spite of its abolition under Eadward the Confessor, was still raised from certain estates. (7)

Considering this accumulation of sources of income, it can

(c) As to *scutagia*, Madox affords us the complete history of its gradual origin. The "Dialogus de Scaccaria" recognizes the *scutagia* as a financial practice; "*Fit interdum, ut imminente vel insurgente in regnum hostium machinatione, decernat rex de singulis feodis militum summam aliquam solvi, marcam scilicet, vel libram unam; unde militibus stipendia vel donativa succedant. Mavult enim princeps stipendiariorum quam domesticos bellicos exponere casibus. Hæc itaque summa, quia nomine scutorum solvitur, scutagium nominatur.*" As to the early combination of the expressions, "*auxilia*," "*scutagia*," "*tallagia*," "*hydagia*," and "*dona*," see Madox, i. 580, 680.

(7) As an item of the Accidental Income (Madox, i. 342) the Danegeld is also mentioned in the legal books (Edw. Conf. 11; Hen. 10, sec. 1, 16 Cart. civ. Lund. sec. 2; Madox, i. 686-694. Thomas, "Exchequer," p. 41; Sinolair, "Revenue," i. 69, 70, 72). This payment was expressly abolished under Eadward the Confessor, and is mentioned in Domesday Book in one passage only (Stamford, 336 b). Nevertheless, it occurs very frequently in the later revenue accounts, especially under Henry I. as an impost upon certain estates. This difficulty, which is remarked both by Freeman and Stubbs, can be explained by the following consideration. The Danegeld as a lawful tax, was abolished,

and remained so, but the old valuation of the productive returns of ordinary lands for the raising of the former tribute was often retained on the occasion of the later exaction of "*tallagia*," "*dona*," "*auxilia*," to avoid making a fresh valuation each time. The old established rate on the productive returns was therefore called Danegeld. Now it is perfectly correct that the general ground-taxes (*carucagia*, *hydagia*, etc.), re-introduced in later times, correspond to the scale of the old Danegeld taxation. But it is very comprehensible that in the laws and ordinances the hated name "Danegeld," with its humiliating memories, was studiously avoided. Every revival of "*Danegeldum*" would have had the preposterous result, that the numerous exemptions from the tax would have revived also, whilst in the course of business in the Exchequer no one scrupled to denote the old taxation of the produce of an estate subject to the common burdens by the term "Dane-money."

Though the most recent English historians describe the gradual formation of a new system of land taxation in this epoch as a disguised revival of the Dane-money, this in nowise describes the position of affairs; but the course of events will probably be more correctly represented in the following account.

well be understood, how the myth arose that the Conqueror raised a daily income of £1060 80s. 3d. from contributions (Ordericus, Vit. iv. p. 528), one of the numerous exaggerations of later historians, which perhaps is based upon an arbitrary counting up of the highest amounts of revenue in certain years, whilst under later reigns the most favourable financial balance scarcely reached a sixth of that income.

Among the manifold sources of revenue to the Crown, undeniably the most important for the future of the Exchequer and the Constitution was the *scutagium*, which arose under Henry II. from the conversion of the feudal services into money; because, according to the position of affairs, in time a uniform land-tax was naturally developed from it, and from that a uniform income-tax, which can be followed up from its first beginnings in this place to the close of the period.

After the privileged landed proprietors, from the greatest Crown vassals downwards, had been subjected to heavy money contributions, which were equivalent to the actual burdens of feudal service, that impediment had been overcome in England which on the Continent caused the failure of land and income tax. As soon as the governing class has been made to contribute in proportion to its means, the development of a just and rational system of taxation meets with no more obstacles. At first a uniform hide-tax could be levied; for the unprivileged landowners could certainly not withdraw themselves from a uniform taxation of the hides, when the privileged classes were taxed in full, in proportion to the amount of their possessions. The farmers of the demesne and the cities had been already included, paying taxes just as the knights' fee estates did under the names of "*tallagia*," "*dona*," "*auxilia*;" being, in fact, taxed quite as often as, and even oftener than, the knights' fees; and this although their landed property had been certainly valued quite as highly. But all other tenants of the great feudal estates found themselves in the same position; for the lord had at last no other way of raising his *auxilia*, *scutagia*, and *relevia* except by taxes, protection-moneys, rents, and work done by his dependants. Already under William the Conqueror, during the great and heavy distress of war (A.D. 1084), the expedient had been adopted of levying a uniform hide-tax throughout the whole country. This was done at a time when no Domesday Book had been compiled, and the division of the feudal burdens was beset with insurmountable difficulties. In view of the threatened Danish invasion at that time, a war-tax, of an amount till then unheard of, being seventy-two pence for every hide, was levied, by which the

whole of the landed proprietors in the country were induced to take the universal oath of allegiance, and to accept its consequences (A.D. 1086). A similar situation arose a century later, when the levying of a "Saladin tithe" for a Crusade (A.D. 1188), and the ransom of Richard I. from captivity (A.D. 1198), required the immediate raising of unheard-of sums. The feudal burdens meanwhile were fixed and distributed by the Exchequer, and the vassallage, true to the tendency of all tax-paying landowners, clung as long as possible to the scale of contributions according to the register. Hence on these occasions land-taxes were levied cumulatively upon all landed property; but the *auxilia* of the knights' fees were still rated according to the scale of the scutages, the other estates according to hides, and therefore the last-named tax was designated as "*carucagium*." As early as the year 1198, under Richard I., a general taxation of the landed estates was resumed, in which a uniform impost of five shillings was raised upon each *carucagium* or hundred acres of land (Stubbs, i. 510); not an immoderate rate, but one which nevertheless met with opposition among the great proprietors, and especially among the clergy, and could not be raised without difficulty. It was natural that the feudal possessors should not willingly acquiesce in such a sudden change in the scale of levying; *i.e.* according to acreage instead of the feudal register; wherefore it came to pass that afterwards the *scutagia* were, for a time, raised separately from the *carucagium* on such estates as did not owe knights' service.

As in this way a simultaneous taxation of the whole of the landed property arose, there was naturally connected with it a simultaneous taxation of movable property. The *tallagia* of the demesne farmers, towns, and tenants, were estimated not only according to the income of landed property, but according to the total capability of performance on the part of the subjects, and accordingly the personal property was similarly estimated, which in cities, owing to their industry and trade, was of considerable importance. The very first endeavour made to include this source of income proportionately, led to a taxation according to percentage or fractions of the total income, which, from the time of Richard I. onwards, gradually appear in addition to the land-taxes as tenths, elevenths, thirteenthths, seventeenthths, and other fractions. The Saladin tithe of the year 1188 is again the first precedent for a uniform taxation of personal property, which was levied cumulatively with the land-tax. For Richard's ransom, there was levied at one and the same time a *scutagium* from the knights' fees, a *carucagium* from real estate, and a proportion of their

income from the cities and from the rest of the population. In this an improvement was distinctly visible on the valuation system of the *tallagia*, against which only the clergy raised objections on its being afterwards repeated.

The modes of taxation that had thus come into practice were immediately abused by King John in his own fashion. Even in the first year of his reign, John increased the *carucagium* from two to three shillings, the *scutagium* from £1 to two marks, and levied the latter from year to year. In the year 1203 he levied one-seventh on the personalty of the Crown vassals, in 1204 an *auxilium* from the knights, and in 1207 one-thirteenth on the personal property of the whole country. Against these innovations there naturally arose an opposition on the part of the Crown vassals, and, indirectly, of the whole nation. It was the crown vassals who, in the first place, were thereby injured in their rights of possession. The levying of scutage had been established without opposition, so long as it was only levied in moderate sums, as a favour accorded to those feudal vassals who did not serve in the campaign. But now a payment of this kind was to be extorted regardless of the question whether the feudal vassal wished to serve in person or not, whether a campaign was intended or not, or whether a case of honour or necessity had arisen, which obliged the feudal vassal to pay a pecuniary aid. Herein lay a fundamental alteration of the original conditions under which the military fees were granted and held; the feudal estates were thus reduced to the level of the common landed estates which were bound to a *carucagium*. But the greatest wrong done to the Crown vassals was undoubtedly the rough-and-ready exaction of a seventh on their personal property, which placed the *tenentes in capite* upon the same footing as the *talliabiles*. Such demands had certainly not been made upon them since the days of William Rufus and his treasurer, Flambard; and against such a course of action the charter of Henry I. had given the solemn promise that the military fees should remain free from all demands beyond their military duty (Charters, p. 101). The time had arrived when an agreement with the Crown vassals, and their consent to the imposition of *auxilia* and *scutagia* could no longer be dispensed with; and thus the taxation question had reached the stage of Magna Charta (cap. 18).

## CHAPTER XIV.

## The Norman Exchequer.

As the financial system is the centre of gravity of the sovereign rights of the Norman State, so it is also the foundation and basis of the permanent offices and official institutions of the State. The hereditary monarchy has found a stronghold in its new demesnes and in its feudal suzerainty, upon which rests the defensive strength of the regenerated State. But this political system is also pervaded by a financial spirit, which goes far beyond the mere necessities of existence, and does not shrink from subordinating even the administration of justice to the interests of revenue. As long as the spirit of the Norman sovereignty is paramount in the history of England, finance is the centre of all government; where provinces, districts, and towns were all subjects of general or special fee-farm tenure, the most important administrative council could only have the character of a financial department, similar to a "war and demesne chamber," or a "general directorium" in the later constitutions of the Continent. This is the meaning of the Norman Exchequer (*Echiquier*); and having regard to its paramount importance I shall proceed at once to discuss the origin and external form, the procedure, and the *personnel* of the Exchequer in connection with the financial control.

I. The Origin of the Exchequer. It is not in itself improbable that the Conqueror organized his financial department according to the custom in Normandy, where an "*Echiquier*" had a prominent position in the twelfth century as the highest government department and court of law. The English Exchequer is, indeed, only a part of the *Curia Regis*, and is accordingly styled in official language *Curia ad Scaccariam*. But in contradistinction to the other functions of the central government, which are merely temporary and periodical, the Exchequer forms the one firmly organized governmental department, "*Curiarum omnium apud Anglo-Normannos antiquissima*" (Hickes, Diss. Epist., p. 48), in which the current administration appears united. The name "*scaccarium*" is referred in the Dialogus, i. 1, to the diapered cloth which, for

the purpose of calculating accounts, was spread out like a chess board over the table, round which the sittings were held. "*Scaccarium tabula est quadrangula, quæ longitudinis quasi decem pedum, latitudinis quinque, ad modum mensæ circumsedentibus apposita, undique habet limbum altitudinis quasi quatuor digitorum, ne quid appositum excidat. Superponitur autem Scaccario superiori pannus in Termino Paschæ emptus, non quilibet, sed niger, virgis distinctus, distantibus a se virgis vel pedis vel palmæ extentæ spatio.*" Year after year we find a number of great functionaries and royal officials, with numerous clerks, assembled round this account table, employed in receiving payments from the sheriffs, the special farmers, and *custodes*, in scrutinizing their accounts, and giving receipts; imposing and receiving periodical aids, tallages, and scutages; appointing the sheriffs and other *fermors* and *custodes*, and calling them to account; deciding legal disputes within their administrative jurisdiction; directing payments to be made for the needs of the royal family, their trains and servants, for war supplies and garrisons, for paying the King's creditors from loans, and for administrative expenses of all kinds—all this being done under the personal superintendence of the King, or according to his actual or supposed personal pleasure. Consonant with these functions, two divisions were early formed: (1) the account department, or *scaccarium majus*; (2) the receipt department, or *scaccarium de recepta, recepta scaccarii, scaccarium inferius*. The one division afterwards had its office on the right, the other on the left side of Westminster Hall. The rooms where the sittings were held were often distinguished; the state session-room with the throne was *scaccarium*, in the narrow sense of the term; and the smaller council-room, *thalamus baronum*. These words, which are always ambiguous, denote alike the place of the official administration, and the functionaries themselves; the chamber, in which the specie is actually deposited, is specially called *thesaurus regis*. (1)

(1) As to the origin and external form of the Exchequer, the chief authority is the "*Dialogus de Scaccario*," a treatise upon the law of the Exchequer, which Madox (part ii.) has printed, and furnished with copious notes. It gives evidence of the early matured development of the administrative machinery, and is a marvellous testimony to the official views respecting the State, such as is hardly to be found elsewhere in the Middle Ages. Gervasius Tilburgensis was formerly regarded as the author; Madox (ii. 834-845) assigns it to Ricardus, Filius

Nigelli, a court chaplain of Henry II., afterwards Bishop of London, and grandnephew of Roger of Salisbury, the great minister of Henry I. Its date may be fixed with tolerable certainty for 1178. In later times the institutions of the Exchequer have again been the subject of an exhaustive monograph, printed for private circulation by F. S. Thomas, "*History of the Exchequer*" (1846); and another publication of Thomas (also unpublished), "*Notes of Materials for the History of Public Departments*" (1846). Certain Treasury Records have been printed by

II. The course of business in the Exchequer embraces in its early arrangement—

1. *Payments into the Treasury.* These are made in the counting-house (office of tellers) in gold or silver coin. The pound (*livre*) of the Norman period is an actual pound of silver of twenty-four half-ounces, and is divided into twenty shillings, and the shilling into twelve pence. The silver penny (*denarius*) is the regularly minted current coin. The mark in silver is accordingly thirteen shillings and fourpence; the shilling about the value of a Prussian Thaler. The gold mark is equivalent to nine silver marks. These values are fairly permanent. It was not until Henry VI. that the coin had lost about a third of its silver contents. But the irregularity of the coinage, as well as the depreciation caused by wear, and by forgeries, led to special precautionary measures. In the case of payments *ad scalam*, sixpence in the pound was demanded "to make good weight;" in payments, *ad pensum*, more than sixpence. Where the purity was doubtful, a smelting test was applied; but this also was remitted on payment of one shilling per pound (nominal combustion). The payment is entered in an account book, and from this transferred to a strip of parchment, called the "bill," or "tellers' bill." This strip of parchment falls through a pipe-like opening into the "tally court," where a "tally" is made of it. This tally is a piece of dry wood, on which the "cutter of

the Record Commission. The oldest existing Rotulus, called 5 Stephen (edit. Hunter, 1833), may be placed, on convincing evidence, as early as the 81st year of Henry I. As to the institution of the Norman *Echiquier*, see Madox, i. 162-165; Warnkönig, *Französische Reichs- und Rechts-Geschichte*, i. 346; Schäffner, *Französische Staats- und Rechts-Geschichte*, ii. 408, 409. Its introduction from Normandy is proved by the "Dialogus de Scaccario," "*ab ipsa regni consecratione per regem Wilhelmum facta cepisse dicitur, sumpta tamen ipsius ratione a Scaccario transmarino*" (Dial. i. 4), as well as by the Latin terminology of the Exchequer. In any case that evidence proves the existence of the Exchequer under William the Conqueror, though an actual importation from Normandy cannot be substantiated. My former view (after Floquet, *Histoire du Parlement de Normandie*, p. 8), that a Norman Exchequer-roll was existing as early as the year 1066, is certainly based upon an error (Stubbs, i. 377), but so is also the opinion of

Bishop Stubbs, that the *Echiquier* of the island of Sicily was imported into England by an English Exchequer clerk, Thomas Brown (see the "Transactions of the Academia Reale," of Rome (28th April, 1878); all the existing legal records, and Treasury rolls of Normandy are of so much later origin, that it cannot be proved from the later constitution of the Norman *Echiquier* that the English was formed after its model. (See also Libermann, "Einleitung in den Dialogus de Scaccario," Göttingen, 1865.) The controversy is after all merely nominal; for the close connection of the judicial and finance administration was in the Middle Ages everywhere a matter of course, and, even if the name of *Echiquier* arose earlier in Normandy, yet the English institutions were so closely connected with the county government, and the machinery was so finely developed by the officials under Henry I. and Henry II., that the material part of the institution certainly belongs to the Anglo-Norman state.



the tallies" has to cut notches corresponding to the sum paid; whilst the "writer of the tally" writes the sum down on both sides of the wood in figures. According to the length of the incision, one notch denotes £1000; another £100; £20; 20s.; 1s.; and so on. The chamberlain splits the notched stick down the middle in such a manner that each half contains the written sums and the incised notches. The two matching parts thus split asunder are called "tally" and "counter-tally," or "tally" and "foil" (folium). The one is retained by the chamberlain; the other is kept by the payer as a receipt and proof to be produced to the account department of the Exchequer. (It was not until 1783, by 23 Geo. III. c. 82, that these notched sticks were done away with in the Exchequer, and checks substituted for them.)

2. *Payments out of the Exchequer* are made on a royal order (writ, or mandate), under the great or privy seal, generally addressed to the treasurer and chamberlains. The usual formula for this purpose is called a "*liberate*." Orders for payments which recur periodically, such as salaries, are called "*liberate current*," or "*dormant*," and are couched in such terms as the following: "*Rex Thesaurario . . . salutem; Liberate de thesauro nostro singulis annis quinque Capellanis nostris ministrantibus in Capellis S. Johannis et S. Stephani Westmonastrii, duodecim libras et decem denarios pro stipendiis suis*" (29 Hen. III.). In the course of time, for the purpose of control, other mandates are inserted. Thus the royal writ is deposited on the account side of the Exchequer, and on the strength of it a "treasury warrant" is issued by the treasurer or some member of the Exchequer staff. Acting upon this warrant, the auditor sends an order to one of the tellers, which is then countersigned by one of the Exchequer officials, and in this form is finally honoured.

3. *The book-keeping of the Exchequer*, divided into the "*rotulus annalis*," the "*memoranda*," and other day books, was early arranged in a technical form. The chief book is the *rotulus annalis*, "the great roll of the Exchequer," the most stately and important record, into which (according to Madox, ii. 112) the accounts of the royal revenues flowed through different channels, as rivers pour themselves into the ocean. These *magni rotuli pipæ* (so called on account of their being rolled up in the shape of a tube), arranged according to counties, have been preserved in their entirety since the first year of the reign of Henry II. (with the exception of two years). Partially printed by the Record Commission, they form the most comprehensive source for studying the administrative law of the Norman period.

4. *The rendering of accounts in the Exchequer.* The most

important accounting parties were the sheriffs of the counties. A great part of the demesne, feudal, and judicial dues passed through their hands, besides numerous disbursements for munition of war, equipments, and salaries. Their duty was not merely to receive and pay over moneys, but also to deal with complicated accounts and receipts. And thus months generally passed away from the provisional payment (*profer*) until the definite sum was fixed (*summa*). Many amounts, such as confiscated *catalla*, and incomes from sequestered property, which appeared in the account in round sums, had to be scrutinized in detail. Disbursements are only passed on presentation of a "warrant of discount," and must be regularly justified by the King's writ; and in the case of regularly recurring disbursements, there must at least be a rescript of the Exchequer. For the repayment of loans contracted by the King, orders for payment are issued upon, the sheriff's yearly rent by writs of "*allocate et computate*." The accounting party must appear in person, and is previously sworn "*de fidei compoto reddendo*;" although sometimes an account is accepted "*per fidem*" or "*per verum dictum*." Occasionally, by royal writ, and later by Treasury rescript also, the presentation of accounts by a clerk, as attorney, is allowed. The final acquittance was often so liable to hitches, that the accounting parties pay sums of several hundred marks to be quit of the responsibility for themselves and their *servientes*. Similarly the accounts are presented by the fee-farmers and bailiffs of the towns, the escheators, the "oustomers," or special receivers of tolls, and all those who have been entrusted by the King with a special administration (bailwyck). Later, the travelling judges have also to render accounts. (2)

5. *The Exchequer court days.* For the settlement of dis-

(2) As to the proceedings in the Exchequer, and especially as to the order in which the functionaries sat at the council table, see Thomas, Exchequer, p. 1 *et seq.* The payments into the Exchequer are dealt with by Thomas, Materials, p. 5. For comparisons of the coinage arrangements of the Anglo-Saxon period, see Schmid, Glossarium s.v. Geldrechnung.

As to the disbursements out of the Exchequer, see Madox, l. 348-350, 362-389. The chief authority is the Dialogus, l. c. 6 (Madox, ii. 373). In later times the numerous controls were further increased; in the time of the Stuarts "a letter of discretion" was drawn, in which the treasurer denoted the special fund from which the pay-

ment is to be made; upon this the parliamentary allowance or disallowance of the disbursements was based.

As to the book-keeping, see Madox, ii. 456 *et seq.*; Hunter, Introduction, pt. i. As to the so-called Rotulus, 5 Stephen, see Madox, ii. 462. As to the more correct date, 31 Hen. I., Reeve's History, i. 218, and the Introduction to the Rotulus Pipe, de anno 31 Hen. I.

The presentation of accounts is described in detail by Thomas, Exchequer, p. 49-58. Examples of the presentation of accounts by special fermors and financial officials are given in great numbers by Madox (for example, the control of the coinage, Madox, ii. 132).

puted and legal points which arise at the presentation of accounts, the higher functionaries of the Exchequer assemble periodically and hold sittings, which are called "*scaccaria*," and are described in the *Dialogus de Scaccario*, ii. c. 1, as follows:—

"*Præcedente namque brevi summonitionis, quod Regiæ auctoritatis signatur imagine, convocantur ad locum nominatum qui necessarii sunt. Accedunt autem quidam ut sedeant et judicent, quidam ut solvant et judicentur. Sedent et judicant ex officio vel ex principis mandato Barones, quorum supra meminimus. Solvunt autem et judicantur Vicecomites et alii plures in regno, quorum quidam voluntariis oblationibus quidam necessariis solutionibus obnoxii sunt rei.*"

The individual accounting parties are summoned thither with the warning, "*Sicut te ipsum et omnia tua diligis*," and a notice of the separate amounts due, "*annotatis omnibus debitis seriatim cum causis*," and with the concluding clause, "*Et hæc omnia tecum habeas in denariis taleis et brevibus et quietantiis, vel capientur de firma tua.*" Those who failed to appear were summoned *realiter* by the sheriff or the "huissier" (usher of the Exchequer), fined in an amercement for every day they neglected to come, and in case of need arrested, and their whole property sequestered by a writ "*de nomine districtionis*." On defalcations being detected, immediate arrest took place. Landed proprietors and corporations also, claiming a franchise, were obliged to appear every year in the Exchequer, when the sheriff presented accounts, and to give account themselves as to the returns, out of which they then were allowed so much as was due according to the terms of their privileges. Failure to appear or refusal of account incurred sequestration. When the King had, as an exceptional case, himself received an account in person, or *in camera sua*, this was notified by writ to the Treasury. (2<sup>a</sup>)

The administrative principles of a demesne department

(2<sup>a</sup>) The Exchequer court-days in their characteristic form, according to the *Dialogus de Scaccario* (Thomas, and Madox, ii.), have also a certain influence upon the later forms of procedure in the central courts. The *privilegia fisci*, which proceeded from the practice of the Exchequer, had permanent results. Where any one was at once a debtor of a King and of a private individual, the "*debitum regis*" must be paid before all else. A debtor of the King cannot dispose by will of his personalty to the prejudice of the King; and his heirs cannot obtain the administration of his personal

estate, if he has died intestate, without the leave of the Exchequer. In case the solvency of the estate is doubtful, the King undertakes its sequestration, calls in outstanding claims by way of administration, and satisfies himself first, with reservation, however, of the burial expenses. Debtors to the Exchequer are also, on demand, allowed a "writ of aid" against their debtors, that by getting in their debts promptly they may be enabled to satisfy the official claims. Herewith are connected at a later period a number of the provisions of *Magna Charta*.

with such full powers, naturally produced for the Exchequer important legal prerogatives, and were the source of the present *privilegia fisci* in England. The decisions of the Exchequer appear as the oldest form of an administrative justice. According to its constitution, the Exchequer is certainly no chief court of law, but is only intended "*ad discernenda jura et dubia determinenda, quæ frequenter ex incidentibus quæstionibus oriuntur*" (Dial., i. 4). But the Norman financial system is inseparably blended with all the branches of public and private law. The fixing of fines and amerciaments, the decision of appeals against the imposition of *tallagia* and other imposts, involved a jurisdiction extending in all directions over the prerogatives of sovereignty. All privileges of the lords of manorial courts and towns, all liberties and franchises, in the sense in which they are used to-day, i.e. all royal grants, the legal validity or extent of which are called in question, are here decided. In every dispute as to a Crown fee, just as in every grant and inheritance of a fee, the Exchequer is an interested party. The *debita regis* have first to be satisfied, in every administration of the estate of a deceased person. From the litigation in ordinary private law also ("*communia placita*," in contrast to those in which the King has an immediate interest) the *fiscus* derived an interest, from the fact that the Exchequer assisted a debtor to the *fiscus* against third parties, to put him in a position to fulfil his obligations towards the King. Hence it can be explained how the Exchequer in meting out administrative justice drew also common civil actions before its tribunal. According to the *Leges Eduardi*, civil suits were, indeed, to be decided by a *judicium parium*; but this provision was formally satisfied by the Exchequer choosing its higher officials from among the Crown vassals, "*barones scaccarii*," in whom even the greatest feudatory was compelled to recognize a properly constituted court.

III. The staff of the Exchequer is divided into the higher officials and the clerks. As all departments of the central government meet together in finance, so all the great officials of the State had a seat here, in person or by representatives. The personal presidency was reserved for the King himself; and in this capacity he acted for centuries. Where a Chief Justice, "*capitalis justicia*," had been appointed by the King, the latter is represented by him. Under Henry II. this chief judge had become a permanent official; the *Dialogus de Scaccario* accordingly mentions him as the president, and the higher judges as "*barones scaccarii*," as important officials, but whose appointments were revocable: "*Illic enim residet Capitalis Domini Regis Justicia, primus post Regem in regno ratione*

*fori, et majores quique de regno, qui familiaris Regis secretis assistunt; ut quod fuerit sub tantorum presentia constitutum vel terminatum, inviolabili jure subsistat. Verum quidam ex officio, quidam ex sola jussione principis resident. Ex officio principaliter residet imo et præsides primus in regno, Capitalis scilicet Justicia. Huic autem assident ex sola jussione Principis, momentanea scilicet et mobili auctoritate, quidam, qui majores et discretiores videntur in regno, sive de clero sint sive de Curia. Assident inquam ad discernenda jura et dubia determinanda, quæ frequenter ex incidentibus quæstionibus oriuntur* " (Dial., i. 4).

In order to understand the position of the Barons of the Exchequer we must remember that they form a supreme court set over the great farming *Vicecomites*, amongst whom are often to be found the first men of the realm, bishops, grand feudatories, etc.; and that their judgment decided questions of law even against prelates and Crown vassals. It was natural, therefore, that the controlling officials in the supreme court should be men of similar position, *i.e.* persons with the necessary rank in the feudal or ecclesiastical hierarchy. The *Barones* were accordingly those among the magnates of the realm who were the most skilled in business, and who stood nearest to the King. The highest court dignitaries have a place of honour among them; as have also the Chancellor and the Treasurer, who gradually became the principal personages among the Barons of the Exchequer. All these higher functionaries bear the name of "*Sedendi ad Scaccarium*;" the latter name, "*Residentes ad Scaccarium*," includes also the under-officials.

The under-officials are difficult to classify, for in the earliest records a large number of persons are comprised under the denotation "*Clericus Scaccarii*;" Madox has, however, with great labour ascertained the individual classes, and arranged them into two groups. The most important under-officials in the account department are: the Remembrancer as keeper of the register and despatcher of business, the *Ingrossator Magni Rotuli*, the Constable and Marshal as representatives of the State functionaries of the same name in the Exchequer, the Usher (*Huissier*), and in later times the *Auditores Compotum* as revisers of accounts. The chief under-officials of the receipt department are: the *Clericus Brevium*, the Chamberlains as keepers of the chest, the *Clerici Thesaurii*, the Tellers as cashiers, and the officials appointed for weighing the coins and applying the smelting test. (8)

(8) For the official staff of the Exchequer, see Madox, i. 197; for the under-officials, Madox, ii. 268 *et seq.* To the under-officials of the account

department belong (1) the Remembrancer, *Rememorator*, registrar, keeper of the register, despatcher of business. (2) The Ingrosser, *Ingrossator Magni*

The spirit of centralization collected together in the Exchequer the whole of the State finances. The other exchequer offices which are found existing are of secondary importance, and in the majority of cases were temporary institutions. For the personal disbursements of the King there is a household treasury with special *clerici* and a *Thesaurarius cameræ*. Sometimes secondary and local exchequers were formed for temporary purposes, as, for instance, a "*Scaccarium redemptionis*" and a "*Scaccarium*" at Worcester. A more important secondary department is the "*scaccarium Judæorum*," under the "*custodes*" or "*justiciarii Judæorum*," having jurisdiction over all affairs relating to the Jews, and comprising numerous clerks and under-officials. The special constitution of this procedure and the attributive justice of this administrative body is so characteristic, that the condition of the government under King John cannot be described more appropriately than by saying that the whole central government had adopted the character of the Exchequer of Jews. (4)

*Rotuli Pipæ*; sometimes two functionaries of this sort, frequently persons of aristocratic families. (3) The Usher, or doorkeeper, entrusted with the safety of the buildings, the money-chest, and the registry; and at the same time doing duty as a Huissier, who receives the customary fees for summoning the sheriffs to the Exchequer sittings. From the time of Henry II. it was an hereditary office, even divisible and descending to women. The one enfeoffed of the "Serjeanty" appointed the acting Huissiers for this office—a curious custom which continued into the 19th century. (4) The Constable, an under-official appointed by the Constable of England, so long as that office existed (Dial., i. c. 5). (5) The Marshal, an under-official provided by the Marshal of England, having certain functions to perform connected with the presentation of accounts (*forulus marescalois*), and with the right to take arrested persons into his keeping (Dial., i. c. 5). (6) *Auditores Compotum* (Madox, ii. 290, 291), revisors of accounts, mentioned first in 9 Edw. II.; originally this business was conducted by clerks appointed *pro hac vice*, or by the barons themselves (Thomas, Exch., 122, 123). (7) Clerks of estreats, who were also of later origin, for the exaction of the amerciaments, fines, etc.

The second group of under-officials belongs to the receipt department, "*Recepta Scaccari*," the "*Scaccarium*

*inferius*." (1) The *Clericus brevium*, clerk of the writs; (2) The Chamberlains, a higher class of under-functionaries, curators of the chest, are appointed by the Grand Chamberlain and the Court Chamberlain of the King as their representatives, and ought properly to be knights; the current business is conducted by special *Clerici Camerariorum*; (3) *Clerici Thesaurarii*, treasurer's clerks—among them is prominent the Clerk of the Pells, bookkeeper of the *Magnus Rotulus de Receipta*, mentioned in Henry III.; (4) The Tellers, the real cashiers or pay-officials, usually four or more; (5) The *Pesours* and *Fusours*, under-officials employed in weighing the coins, and applying the smelting test, originally hereditary offices, Serjeanties united with landed estates, hereditary and divisible. Besides these, goldsmiths for the testing the metal, essayers, and other assistant-officials were engaged at salaries as they were wanted.

(4) The Exchequer of Jews is described by Madox, i. 221 *et seq.* Its existence is explained by the original absence of legal rights in the Jews, whose position may be compared with that of the German "Kammer-Knecht des Kaisers," and who were not merely subjected to unsparing *tallagia*, but were bled in every way at pleasure, sometimes under the name of "protection right," and sometimes of a "right of occupation." This view of the *fiscus*

is unequivocally declared in the *Leges Edwardi Confessoris*, sec. 25: "*Ipsi Judæi et omnia sua regis sunt. Quod si aliquis detinuerit illos vel pecuniam eorum, rex requirat tanquam suum proprium, si vult et potest.*" Since they have no *persona standi in judicio*, no landed property, and no right of inheritance, and their legal capacity depends upon the royal favour alone, arbitrary conditions and payments are attached to their legal intercourse. First, their right to bring actions in their contracts with Christians was only recognized when the terms of the bond were to be found in the chest of the Jewish secretary (*chirographer*). The inheritance of their property is only allowed on payment of heavy fines. For example, Henry III. demands six thousand marks of a widow for the personal estate of her deceased husband. The causes and pretexts for the imposition of amercements are of course innumerable. One of the most common was for marrying without the royal consent. At times all Jews were thrown into prison, and then released on payment of heavy fines, on one occasion of sixty-six thousand marks; on another occasion the Jews were pledged to the Earl of Cornwall for a loan of five thousand marks. Hence the numerous "ransoms," "compositions," "fines for protection," and "licences" in the Jewish administration. In return for great sums, they were allowed important privileges. For instance, in the *Charta 2 Joh.*: "*ut si Christianus habuerit querelam adversus Judæum, sit judicata per pares Judæi. Et Judæi non intrabunt in placitum nisi coram Nobis,*" etc. In the fifth year of John's reign a formal jury was formed of "*legales Christiani.*"

*et Judæi.*" For this department, under Richard or earlier, a separate and secondary exchequer of "*custodes*" or "*justiciarii judæorum*" was told off, consisting at first of Christians and Jews together, at last composed for the most part of Christians, appointed under the great seal. They have jurisdiction in all matters touching Jews, such as the scrutiny of the accounts presented, the decision of actions arising out of Jewish contracts, and disputes touching their landed property, their personalty, taxation, fines, and forfeitures. Under the *justiciarii* stand the *chirografarii* and *coffrarii* (who preserve in chests the charters and bonds between Christians and Jews), as local officials, appointed in places where a considerable number of Jews dwell. From the practice of this secondary exchequer a special Jewish finance law becomes formed, "*Law, Assize, or Custom of Judaism*;" under Richard I. the judges on circuit have instructions given them as to this custom (*capitula de Judæis*). In the short period from 50 Hen. III. to 2 Edw. I. (1265-1273) the Crown was credited with £420,000 "*de ex-  
itibus Judæorum.*" (Coke, *Inst.* ii. 89). The whole institution comes at last to a sudden end through the expulsion of all Jews from England (19 Edw. I.); in consequence of which act they remained for 364 years entirely banished from the country. The number of the expelled Jews was 15,060 (D' Blesier Tovey, *Anglica Judaica*, Oxford, 1738; J. M. Jost, *Gesch. der Israeliten*, Berlin, 1820-28, vol. vii. pp. 102-171). As to the other secondary exchequers, and provisional payments in other places, see Madox, i. 262-271.

## CHAPTER XV.

V. *The Rise and Decay of the Norman Church Supremacy.*

THIS fifth and last division of the sovereign power took a different course in the Norman period. In the same degree in which the temporal government became consolidated under an absolute monarchy, the Church advanced in the direction of a Romanizing centralization, which confronted the power of the Crown by the equally strong power of the Pope. In the middle of the period this made a breach in the system of absolutism.

William the Conqueror had not under-estimated the influence of the Church. He had found her an influential power under Eadward the Confessor, and in possession of about a third of the revenues of the soil. With her support the new throne was won, the sanction of the Pope was the sole indisputable title to it, and the lower clergy were the class upon which the obedience or the opposition of the masses in a great measure depended. The feudal and ecclesiastical States were obliged to form an alliance with one another to attain their culminating point. The Conqueror recognized this relation in a number of concessions.

England adopted the Roman Liturgy, and submitted to the ritualistic precepts of the Papal Chair. The assurance of liberal and punctually collected Peter's pence was very welcome to the Curia. The celibacy enjoined upon the clergy still met with a passive resistance, which was only gradually overcome after the time of Henry I.

The liberal endowment of the Church in its archbishoprics, bishoprics, chapters, monasteries, and other foundations, is not only maintained, but extended by many new gifts and ecclesiastical foundations. The monasteries especially increase under Henry I., Stephen, and Henry II., in such a manner that their number is computed in the "*Notitia Monastica*" at three hundred. At the close of the period the Church is said to have been in possession of about the half of the soil of the country, but this probably means only the half of the ground rent of the greater estates.

The ecclesiastical jurisdiction over clerical persons and



matters is recognized in all its ancient extent, and also is from this time forth separated externally from the temporal courts. The Anglo-Saxon union of bishop and ealdorman for the purpose of holding common court days for clerics and laymen was in the highest degree antagonistic to the spirit of the Roman ecclesiastical government. The Earl had now retired from the position of president of the county court: the co-operation of bishop and *Shir-gerêfa* was all the less likely to be acceptable to both parties. The internal contrast between the spirit of the popular court and that of the ecclesiastical district court had made itself more and more felt, and the desired separation of Church and State was in this point conceded. This step, so characteristic of the legislative power of the time, is taken towards the end of the Conqueror's reign by means of a writ addressed to the *Viccomites* (*Charters*, p. 85), but with the assurance that it is taken "*communi concilio et concilio Archiepiscoporum et Episcoporum et Abbatum, et omnium principum regni.*" Sec. 2: "*Propterea mando et regia auctoritate præcipio, ut nullus episcopus vel archidiaconus de legibus episcopalibus amplius in hundret placita teneant, nec causam quæ ad regimen animarum pertinet, ad iudicium secularium hominum adducant, sed quicumque secundum episcopales leges de quacunque causa vel culpa interpellatus fuerit, ad locum quem ad hoc episcopus elegerit vel nominaverit veniat, ibique de causa vel culpa sua respondeat, et non secundum hundret, sed secundum canones et episcopales leges rectum Deo et episcopo suo faciat. (Iudicium vero in nullo loco portetur, nisi in episcopali sede, aut in illo loco quem ad hoc episcopus constituerit.)*" The summoning of the parties before the now independent ecclesiastical courts took place under threat of excommunication; "*et si opus fuerit ad hoc vindicandum, fortitudo et justitia regis vel vicecomitis adhibeatur.*" Furthermore, the *Viccomites* and royal bailiffs are forbidden to interfere with the course of business in these courts. Upon this separation the "*Curie Christianitatis*" take with them the consideration of such secular matters as had, chiefly for external reasons, been left to the spiritual authorities, when both were formerly united.

The "*Leges episcopales*" here form a contrast to the "*Leges Eduardi*," embracing as they do all that was formerly decided according to the rights and customs of the clergy. In the now independent ecclesiastical courts, the applicability of the *jus canonicum*, of the *Decretals*, and of the resolutions of the *Concilia*, is, with very few exceptions, regarded as a matter of course. Thus there arose a jurisdiction over matrimonial matters, wills, and indirectly over questions of legitimacy and the inheritance of personalty, over verbal contracts, tithes, church dues, and church sees, which was independent of the

temporal power; a penal jurisdiction for the maintenance of orthodox doctrine and Church discipline, and for the punishment of bigamy, incest, fornication, and other offences against morals; and a more and more sharply defined magisterial authority over the whole of the clergy. To this was added an appeal from the ecclesiastical decision to Rome, and to the practice of the papal legates, and thus was formed an almost sovereign power within the political state.\*

The Conqueror plainly recognized the possibility of this consequence, and endeavoured to avert it by the following checks drawn from both the old constitution and the new.

I. The ancient rights of the Anglo-Saxon State over the Church were retained, especially the royal ratification of the resolutions of the Councils. In the year 1108 we still find the *canones* of the Ecclesiastical Council in London adopted "in the presence of the King, with the consent of his men." In the year 1127 Henry gives his consent to all the resolutions passed in an ecclesiastical Council, and ratifies the same by his royal power and authority (Stubbs, i. 874). By virtue of the King's right of making decrees, the clergy are forbidden to leave the kingdom without royal licence, to recognize a Pope without royal direction, to publish circular letters from Rome before they have been seen and approved by the King, or to pronounce sentence of excommunication upon a royal vassal without the King's permission. In like manner the right of appointing bishops or abbots was preserved according to old custom. These appointments are now made on high court days, after hearing the spiritual and temporal magnates. Very frequently a royal chaplain, in any case a man in whom the King had personal confidence, was appointed bishop. To these old conditions the Conqueror added a new and comprehensive arrangement.

II. The great landed possessions of the clergy are considered, according to the system of the feudal suzerainty over the whole land, as granted to be held under the same laws of tenure as the baronies and knights' fees; that is, with the full burden of the feudal services, suit of court,

\* The separation of the ecclesiastical jurisdiction into separate courts took place at a time of extreme tension, in which the imperial proclamation of the Norman military feudal law still met with resistance. Hence it is easy to understand that the Conqueror resolved upon a concession, which satisfied the most cogent demands of his superior clergy, and shortly afterwards rendered possible the act of homage at Salisbury. The contents of the decree as to the

separation of the spiritual jurisdiction is quite clear. The word "hundred" designates the secular place of justice, in which also the county courts were held. The independence of the *Curia Christianitatis*, however, did not exclude the obligation of the clergy to do suit of court (*secta regis*) in their capacity as Crown vassals. What the *Leges Hen. I.*, sec. 2, contain on this point was the established law of feudal custom.

and feudal dues. This theory was applied to the estates of about one hundred and fifty bishoprics, chapters, abbeys, and greater parishes; but not to the glebe-lands, tithes, offerings, and fees of the ordinary parishes. Thus was solved an old problem of the Anglo-Saxon military organization. The bringing of the rich ecclesiastical estates, with their thousands of interests, into the feudal register of the realm was a step of great significance, and it was the more popular because the great bishoprics and monasteries were thus compelled to adopt subinfeudation, by which means many old landed interests of Saxon Thanes were preserved, and many new ones created. The interest of the temporal lords urgently demanded this equalization. The Church had not hitherto been able to claim more than an equality with the highly privileged landowners. The administration endeavoured here to enforce the new order of things with certain indulgence. A number of monasterial estates retained their customary immunity as "tenures of frankalmoign." A portion of the feudal services remained in arrears, and was excused. For a long time in the Exchequer accounts the scutages of the prelates were divided into two classes—into those "*quæ recognoscunt*," and "*quæ non recognoscunt*," the last named remaining in abeyance. In ordinary practice no personal military service was required of the spiritual lords; in their case a remission of feudal service for money payment was first allowed. An indulgent spirit towards the clergy is also visible in the matter of aids, amerciements, and sequestrations.\*\*

III. In the same way, all the other sovereign rights are also enforced against the clergy. The military summons is issued to all ecclesiastical vassals in the usual form; generally, therefore, through the *Viccomes*, and with like effect. The Exchequer accounts show that even bishops and abbots were fined on this ground, and had their estates sequestrated.

\*\* According to the later investigations of Freeman and Stubbs, this application of the Norman feudal system to the landed estates of the Church certainly did not take place instantly: for the theory of the forfeiture of their landed property, by "rebels," and of the "redemption" of possessions on the part of the rest of the landowners, was inapplicable to the landed estates of ecclesiastical corporations. But since the great act of homage at Salisbury, the universal obligation to fealty, to feudal services, and to feudal payments was derived from the legal act of investiture and the feudal oath; numerous indications bear witness that

under William Rufus the notorious Flambard applied all the consequences of the feudal law to the ecclesiastical estates also. The practice of the Exchequer, the Constitutions of Clarendon, and the fully developed theory of the English feudal law, as it is laid down in the legal work of Glanvill, show the application of the feudal system as a completed fact (Stubbs, i. 298, 299, iii. 357, and other passages). Connected therewith is the energetic retention of the investiture of the greater estates of the clergy, which lay as much in the interest of the Crown as in that of the temporal vassals.

Under Henry III. there occur even summonses to the clergy to do personal service in the army.

To the judicial power both higher and lower clergy are so far subjected, that they have to do suit of court (*secta regis*) both in the county court and in those court commissions which were immediately formed by the King. It was only a more indulgent practice which, permitting them to be represented in the county assembly, limited the compulsion to find the verdict in person to the *curia regis*; and here also no participation in passing a death sentence was demanded from the prelates. In their character of vassals of the Crown, they remain passively subject to the royal court; "I do not condemn a cleric and a servant of the Lord, but my Earl whom I have placed over my realm," said William I., when he personally arrested his brother, Bishop Odo.

The clergy with their tenants are subject to the police control, as a consequence of the temporal judicial supremacy; the Exchequer accounts show us that all the new police laws and the practice of amerciaments were enforced, even against the highest clergy.

In like manner the Norman exchequer accounts show that the financial supremacy of the King is also exercised against the clergy. Money claims of the King upon a *clericus* were first exacted from the fief by distraint; failing this, an order was issued to the bishop to seize the *beneficium* of the cleric, "otherwise the King will come upon the bishop's barony." All feudal incidental payments, "*relevia*," "*auxilia*," "*scutagia*," are extended to the Church. For the revenues derived from wardship and marriage, which are here absent, the King compensates himself by withholding the temporalities of the bishop's see, which under William Rufus sometimes remained vacant for five years. As a matter of course, the old common burden of the *trinoda necessitas*, which since Henry II. receives a new importance owing to the revival of the militia system, is also incumbent upon the clergy.

According to the Conqueror's calculation, the maintenance of the royal authority thus appeared secured, even after the concession of a separate ecclesiastical jurisdiction; and the first three kings of the Norman period remained upon this basis virtually masters of the Church. The dispute about investiture under Henry I. ended in a compromise, by which the King renounced the enfeoffment with ring and sword, but reserved to himself the full feudal suzerainty.

The usurpation of the throne by Stephen, however, caused a severe shock to the royal authority. The exclusiveness of the episcopal jurisdiction was declared in an oath extorted

from the King; the interference of the papal legates and the appeals to Rome increased to such a degree, that Stephen's successor found before him the difficult task of establishing afresh the old order of things.

A century after the Conquest, under Henry II., the Church and State had arrived at a turning-point in their mutual relations, and the position of the Church had now become much more favourable and popular than it had been at the commencement of the Norman period. What the Church had lost, by its subjection to the feudal State, had been retrieved upon the ground of moral influence; for to its other callings a new one had now been added. In the dissensions of nationalities it had become the natural mediator, the nearest protectress of the oppressed Saxon element, the sole power whom the Norman kings at their court days were at times obliged to meet on the footing of negotiation. Even though the high prelates had become Norman, yet the great mass of the clergy still belonged to the Saxon population. Saxon "clerks" were the chief staff of the Norman administration, necessary interpreters to the French-speaking lords, and not unimportant intercessors for the mass of the oppressed classes. The corporate spirit of the clergy had advanced far enough to uphold, amidst the discord of nationalities, the unity of the Church, which on that very account could not be subject to the haughty class of nobility. And under these circumstances it was very significant that Henry II. himself appointed a man like Thomas Becket to the archbishop's see; one who by birth belonged neither to the Norman nationality nor to the privileged class.\*\*\*

\*\*\* For a time the ecclesiastical influence was diminished owing to the fact that the ranks of the clergy had become internally disunited. Since the year 1070 the Conqueror had filled with Norman clerics the two Archbishoprics of Canterbury and York, and then by degrees the bishoprics and the most important abbeys also. The curious state of things arose that the higher clergy were not able to speak to their flocks so as to be understood. The dislike of the Saxon population to a foreign tongue and foreign customs was now extended to the dignitaries of the Church. Among the numerous successful upstarts of the times were to be found many adventurers belonging to the clerical profession. The majority of the important ecclesiastical dignities were, however, so far as can be ascertained, filled by worthy persons. Daily labour in the ecclesiastical

calling, the feeling of solidarity against the arrogance and violence of the military vassals, and the powerful corporate spirit of the clergy (increased by the gradually enforced celibacy) appear in the Anglo-Norman Church with unmistakable plainness. But on the other side is visible in the first century of this period the strong personal influence of the King over his prelates, who have been for the most part court chaplains and royal secretaries. "The cohesion of the Church was for ages the substitute for the cohesion which the divided nation was unable otherwise to realize. . . . It was to an extraordinary degree a national church, national in its comprehensiveness as well as in its exclusiveness. . . . The use of the native tongue in prayers and sermons is continuous; the observance of native festivals also, and the reverence paid to native saints. The eccle-

Under such altered circumstances Henry II. saw himself involved in a critical struggle with the ecclesiastical power, in which he was in the end unable to recover full political power over the Church. With her separate administration (*jurisdictio*) she everywhere opposed the temporal jurisdiction. The maxim of separation of Church and State had led to this, that the lower clergy for three generations found their law and discipline entirely in the canon law, their ideal in complete severance from the laity; and that a very influential party among the clergy, especially in the monkish orders, stood resolutely on the side of Rome. The Church was free from the fiscal odium of the secular administration; she had the popularity which surrounds all forces that resist an absolute government. Henry II. did not dare, under these circumstances, to carry out the re-establishment of the royal prerogatives without summoning to his aid the most powerful and influential persons among the laity. He summons accordingly (1164) in the formal manner of a "*cour de baronie*" the greater Crown vassals and prelates, collectively and separately, to attend the extraordinary assizes of Clarendon and Northampton. At the opening of the first-named assembly, in January, 1164, sixteen articles were presented and carried, which concern the ancient powers of the ecclesiastical supremacy. The chief article (No. XI.) is as follows:—

*" Archiepiscopi, episcopi, et universæ personæ regni, qui de rege tenent in capite habeant possessiones suas de rege, sicut baroniam; et inde respondeant justiciariis et ministris regis et sequantur et faciant omnes consuetudines regias, et sicut cæteri barones debent interesse judiciis curiæ domini regis, cum baronibus, usque preveniatur in iudicio ad diminutionem membrorum vel mortem."*

By this (1) the subjection to the feudal jurisdiction and to all feudal burdens was declared anew; and with it also the temporal penal jurisdiction over the persons of the clergy was recognized in principle. Where clerical offenders are examined in an ecclesiastical court a secular judicial official is to be present, and the convicted offender is not to be further protected by the Church. Feudal vassals of the King shall be outlawed only after previous trial, and with approval of the royal court.

(2) The highest appellate jurisdiction of the King upon English soil was retained, and the parties are forbidden "*ulterius procedere*" (that is, to appeal to the Papal Chair)

siastical and the national spirit thus growing into one another supplied something at least of that strong pas-

sive power which the Norman despotism was unable to break" (Stubbs, *Const. Hist.*, i. 245).

without special leave (Art. VIII.): "*De appellationibus, si emerint, ab archidiacono debent procedere ad episcopum, et ab episcopo ad archiepiscopum. Et si archiepiscopus defecerit in iusticia exhibenda, ad dominum regem perveniendum est postremo, ut precepto ipsius in curia archiepiscopi controversia terminetur, ita quod non debet ulterius procedere absque assensu domini regis.*"

3. The royal rights of appointing to vacant bishoprics and abbeys were especially and formally recognized. The revenues of the vacant sees fall to the royal Treasury, until the time for the new election has arrived. The formal election takes place in the King's chapel, and with his consent, and there, before being consecrated, the "*electus*" must take the oath of allegiance to the King as his feudal lord in respect of his temporal fees, with reservation of his ecclesiastical rank.

These and other principles were compiled from precedents, and were, as "ancient customary law," so indisputable, that the bishops, as well as the secular vassals of the Crown, recognized them without hesitation. Thomas Becket knew these principles, and had applied them for several years when he was chancellor; and accordingly, after some resistance, found himself compelled to make an unwilling concession, and to promise to keep these articles "*legitime*" and "*bona fide*." When, however, by means of the clause "*salvo jure ecclesiæ*," and under the authority of the Pope, he continued his resistance, the King formed a decisive precedent by obtaining from a well-attended court of spiritual and temporal vassals of the Crown, on the 17th of October, 1164, the condemnation of the primate in *misericordia regis*, which was then in the customary manner reduced by the King to an amercement of £500. But the hard-earned victory was lost again owing to the passionate and intriguing conduct of the King, the violent issue of the dispute, and the martyrdom of Becket. At the final conclusion of peace, great points were yielded to the Church, especially the appeals to the Pope. By later articles the principal point was conceded to the Pope's legate, viz. that for the future no cleric should be summoned to answer for a crime before a temporal judge, except on account of a secular fee, or of an offence against the hunting laws. The other points of unpleasantness to the clergy were also for the most part omitted. In its further development the concession of a separate judicial jurisdiction led to the privilege of milder punishment, under the term of "benefit of clergy."

Under King John the Curia advanced still further, and in the course of a dispute between the King and the Chapter of Canterbury, succeeded even in procuring the appointment of

the primate under papal authority, and, in the further course of the dispute, the free canonical election of the bishops, as well as the feudal suzerainty over the English Crown.

Thus the relationship to the Church became the one weak point in the system of Absolutism. Towards the close of this period the old relations between the higher clergy and the Crown become changed. Whereas formerly the King was sure of seeing in the bishops' sees only prelates who were known and personally subservient to him, from this time onward the ecclesiastical corporate spirit designates the dignitaries of the Church by canonical appointment. The charter of 15th of January, 1214 (Stubbs' Charters, 288), touching the freedom of ecclesiastical elections, has especial influence on later centuries. It was this "Charter of Liberty," afterwards confirmed by 25 Edward I. stat. 6, sec. 2, which considerably altered the character of the English episcopal bench up to the close of the Middle Ages. Under Henry III. the papal power had reached the zenith of its might in England, and this, in consequence of the realm being overrun by foreign clergy, led to a reaction on the part of the land-owning gentry as patrons of the churches. The influence of the King is now confined to withholding the temporalities during the time a see is vacant, and to the moral influence of the feudal oath of fealty; through which, by the withholding of the temporalities, a renunciation could be compelled "of all the clauses of the Papal Bull, which were opposed to the royal prerogative, and the law of the land." The breach in the absolute royal power which was here made could not be healed in the course of the Middle Ages. It was the first opening, by means of which Magna Charta introduced the beginnings of parliamentary privileges.

NOTE TO CHAPTER XV.—The course which the ecclesiastical disputes took in the Norman period forms the standard for estimating the inherent strength of the absolute monarchy, and must for this purpose be set forth connectedly.

Under William I. the concessions concern merely the immediate wishes of the Church: a separate ecclesiastical jurisdiction, the Peter's pence, and the moderate inculcation of celibacy. William had also no objections to the doctrine of transubstantiation. On the other hand, he rejects with proud resoluteness the demand of Gregory VII. for a suzerainty, and the taking of the oath of allegiance, asserts his supremacy over the Church in all external matters, and assures himself of

the due exercise of it by reserving to himself the *placet* to the publication of all circular letters from Rome, and by reserving his consent to all Councils, all *canones*, and to the excommunication of any royal vassal (Eadmer, *Hist.*, p. 6, Wilkins, *Concilia*, i. 199).

William II. misuses his fiscal rights against the Church, as in other directions; leaves, among other things, the Archbishopric of Canterbury vacant for nearly five years; and is soon involved in a quarrel with Archbishop Anselm as to the taking of the oath of fealty, in which temporal and spiritual vassals take the King's part. A Council of the year 1097 resolves that "the archbishop has to leave the realm within eleven days."

Henry I., who by a cunning usurpa-



tion of the throne had anticipated his elder brother Robert, was dependent upon the support of the clergy, and accordingly recalls the archbishop, Anselm, who again refuses the oath of fealty. After a long dispute Henry I. declares in a Council of the year 1107, upon his absolute authority, that the investiture with the ring and the staff, the symbol of the conferring of the *spiritual* office by the King, or a lay patron, should for the future be abolished.

Under Stephen, the usurpation of the Crown brings confusion into this question as into others. By extensive promises Stephen brings the higher clergy over to his side, who then become faithless to all the vows formerly made to the Empress Matilda; but later they also leave King Stephen in the lurch. In 1138, things had come to such a pass, that in the Council of Westminster a papal legate promulgates sixteen canons, and takes into his own hand the conduct of the elective act for appointing to the Archbishopric of Canterbury. In the course of a few years the Papal Chair becomes the court of appeal for all contending factions.

Henry II., in a difficult position, thinks to secure his royal prerogatives by choosing his favourite and chancellor Thomas Becket, but finds at once in him an ambitious, energetic, and equal opponent. In 1164, the principal dispute is fought out at the *Assizes* at Clarendon and Northampton, when again spiritual as well as temporal prelates declare for the King. The sixteen articles of Clarendon comprise in a formulated shape the sovereign rights of the feudal State. But in the course of the dispute passionate irritation loses him most of the advantages which had been gained. A thoughtless word of the King causes the murder of the Archbishop. Under the moral impression caused by this martyrdom, Henry II. is compelled in the year 1172, in the presence of the papal legates and a great assemblage of temporal and spiritual lords at Avranches, to purchase peace with the Church by taking an oath "to allow the appeals to the Pope *bona fide* from that time forward, and to remove all evil customs against the Church which had come into use during his reign."

The first century of the Norman period had almost brought into a con-

dition of equilibrium the two powers which were struggling with each other. But after Henry II. the power of the Crown diminishes quite as continuously as the power of the Papal See rises, until the latter reaches its famous climax under Innocent III., whose rule is contemporary with the miserable reign of John. The humiliating submission of John, and his restoration to the throne as the vassal of the Pope, bring about the situation of Magna Charta (A.D. 1215). The material points of dispute which arise in this period are in a compressed sketch of their course as follows:—

I. The celibacy of the secular clergy. This, under William I., is at first only partially recognized, for the married clergy are still allowed to retain their wives (A.D. 1076). Henceforward, however, the ecclesiastical decrees are more strict. The canons touching celibacy increase in number. Those of the year 1107 contain a positive command directed to the married clergy to separate from their wives, and the rule that the sons of priests should never "inherit" the Church of their father. In the following year, however, Pope Pascal II. sends a letter of dispensation from the command of divorce, "because its execution in England would be very much out of place, seeing that there the best and greatest part of the clergy is of that sort." In 1126, at a full ecclesiastical Council at Westminster (at which, for the first time, a papal legate presided), the legate, John of Crema, with great zeal pleaded for "*immaculata castitas*," but was himself obliged to leave the country in secrecy and haste, in consequence of an immoral scandal (Huntingdon, 219; Hoveden, 274; Knyghton, 2382). In 1192 it was thought possible to carry out the prohibition of marriage by leaving the enforcing of it to the King. But Henry I. made use of this power only by allowing every priest to keep his wife on payment of a fine. It was not until the twelfth century that the increasing power of Rome at last effectually enforced celibacy.

II. The dispute as to investiture broke out under William II. in consequence of the refusal of Archbishop Anselm, the King having up to that time enfeoffed his prelates with the ring and staff. At the council of 1095 even the bishops ranged themselves on the side of the ancient custom. But now, in consequence of this case, in the

year 1098, a solemnly promulgated and severe canon was launched against investiture by laymen, and Henry I., by reason of his having usurped the throne, was not in a position to reject the mediation of the Pope on this question. In spite of the opposition of the secular vassals, the King acquiesced when Anselm consented to recall the sentence of excommunication passed on the prelates who had accepted a royal investiture. When at last the question was brought before a Council at London, to be decided on principle, the King ended the dispute by declaring on his personal and absolute authority "that in future no one shall be enfeoffed by the King or a lay patron of a bishop's see or an abbey by the delivery to him of a pastoral staff and a ring, but that, on the other hand, consecration should not be denied a chosen prelate by reason of the *homagium* which he pays to the King." Thus there arose a partition of the right of the investiture, which had been hitherto an exclusively royal prerogative. The compromise now places the election in the hands of the chapter, the consecration in the hands of the archbishop and bishops, the grant of the temporal goods and authority in the hands of the King. The election took place, from this time, at the chapter-house of the cathedral church, where the wishes of the King were communicated, either by letter or message (not, as formerly, by direct order). When the prelate elect had received the royal assent, the choice was scrutinized and confirmed by the metropolitan. Before or after the consecration, the bishop received from the King the temporalities, and took an oath of allegiance to him, corresponding to the *homagium* and fealty of a temporal lord (Stubbs, iii. 295, 296).

III. The appointment of the bishops by the King was such an undoubted, firmly established custom, that, in the first century of the period scarcely an objection was raised to it. Only in the election of the Primate of England the more exclusive character of the spiritual State made itself felt, an appeal being probably made to precedents; according to which, at the appointment of the head of the English Church, the chapter and the voice of the bishops had been heard. The elections of the archbishops Lanfranc, Anselm, and Radulfus (A.D. 1070-1121), proceeded

still from the kings, who only afterwards consulted the prior and the convent as to their opinion. The violent dispute which began under Henry I., between the "monks" (canons), and the bishops, continued for a whole century. After the murder of Thomas Becket (A.D. 1170), a double election took place, which the Pope decided; and, after this precedent, he claimed the right of confirming all elections of bishops. The question of election was at last decided by Innocent III. in favour of the Canons of Canterbury against the bishops. In the course of the dispute the royal right more and more dwindled to a mere right of confirmation. At the close of the twelfth century, the rights of each party had become tolerably closely defined. The royal consent was indispensable; the right of the chapter to elect, and the confirmation of their choice by the archbishop, was formally recognized. The deciding authority of the Pope in disputed cases was upheld by strong precedents, but in the case of disputed episcopal elections the Pope had only an appellate jurisdiction. Only in the case of an archbishop an immediate papal confirmation and recognition was carried out by the Curial theory of the Pallium (Stubbs, iii. 304). Before receiving the Pallium the archbishop may not consecrate any bishop; but on receiving it he has to swear obedience to the Pope in a form which, in process of time, becomes more and more stringent (Stubbs, iii. 297, 304). After free canonical election had been introduced by the charter of John, the royal right of confirming the election was also abolished. The royal influence after this time confined itself to the moral influence of the feudal oath, and to the fact that the King, by withholding the temporalities, could in any case enforce a renunciation of "all the clauses of the papal Bull, which should be opposed to the royal prerogative and the law of the land." It was not until the next period that a strong influence of the King upon the appointment of the bishops became indirectly re-established.

IV. The exclusiveness of the spiritual jurisdiction and its independence of the royal judicial jurisdiction, forms the most important point of the English Church controversy. Even Henry I. had on this point resolutely opposed the ecclesiastical claims. The appeal to Rome was only allowed under royal

licence, and then only in cases which a royal court of law was incompetent to decide. Under Stephen, however, the exclusiveness of the episcopal jurisdiction over spiritual persons and matters was declared; and, after the system of appeal to the Roman chair had once begun under the legate, the Bishop of Winchester, in a few years it went so far that all the more important matters were referred to Rome for final decision. This state of things Henry II. found existing, and, in connection with it, a partially disordered clerical body, who, under the protection of their privileged judicial position, had in the course of ten years more than a hundred unpunished cases of manlaughter to show. In the face of these excesses, Henry II. was able to count on the acquiescence, not only of his Crown vassals, but also of the majority of the bishops.

At the commencement of the dispute with Thomas Becket, Henry had the sixteen articles of Clarendon drawn up by two of his justiciaries, Robert de Luci and Joscelin de Baliol, which articles, in fact, only contain the royal prerogatives so well defined by precedents, that in the assize of 1164 even the bishops recognized the royal rights. Thomas Becket sought in vain for a legal title for the new position of the Church; he was unable to find one, except in the authority of the Papal Chair. It was under these circumstances a decisive victory, when the King, at the Council of Northampton (17th Oct., 1164), brought about the condemnation of the Primate, and with it the recognition of the English custom. But, from that time forward Henry II. ruined his case by persecution and personal chicanery, which aroused the sympathies of the Saxon population for the archbishop. Against the murdered, and soon afterwards sainted Martyr, according to the spirit of the age, the King's case could no longer be victorious. In spite of all his shrewdness and perseverance, the principal object of the dispute was lost at the final conclusion of peace (A.D. 1174). The King allowed the appeals to the Pope, and in his acknowledgment made to the papal legate, Petroleone, limited the royal jurisdiction to actions brought on account of feuds and hunting offences. In the struggle against his rebellious sons and against the sympathies of the Saxon population for the ecclesiastical cause, the King had

grown old and weary. Under Richard and John, under the influence of the Crusades, and the manifold complications in the interior of the country, the papal power continued to advance until it reached the pinnacle of its might under Innocent III.

V. The recognition of the papal legates forms an important incident in the dispute as to the jurisdictions. Henry I. had for a long time set himself against their admission; but the complications which his resistance engendered compelled him to give way. Scarcely were the legates admitted, than, as early as 1126, a legate, as such, held a Church Council, and published seventeen canons, under the sole authority of the Pope. Under Stephen their insolence rose so high as to summon the King to answer before a legate and Church Council. This might later be disavowed as extravagance. But the legate system had gained a footing; and the circumstance that archbishops of Canterbury had taken the position of legates, proved unfavourable to the independence of the English Church. The union of the powers of the legate with the office of archbishop, compelled the King to recognize indirectly the supreme jurisdiction of the Pope, so soon as it was placed in the hands of one of the archbishops. After Honorius III. (A.D. 1221), the archbishops appear to have received the regular commission of legates, as being "*legati nati*," from the moment of their recognition at Rome, and this was acceded to on the part of the Pope, with reservation of the right to send "*legati a latere*," who suspend the power of the "*legati residentes*." The legate system also reached its culminating point in the confusion under John.

VI. A further incident of importance was the exemption of the monasteries from the episcopal power. It began with the commencement of Henry II.'s reign, after which time the policy of the Papacy worked systematically towards weakening the episcopal authority. On the strength of an evil precedent, the richest abbeys, one after the other, were wrenched from the bishops, and then actually subordinated to the Pope and his legates.

Another incident is the contest between the Archbishops of Canterbury and York for the primacy, which, in the vicissitudes of this century, fell to the Pope for final decision.

In these controversies the weapons

employed by the two powers are characteristic of their respective positions. The King contends with the means he derives from his feudal, police, and financial supremacy, by withholding the temporalities, the sequestration of feudal possessions, the confiscation of personalty, the enforcement of amerciaments, and the application of the right of making decrees in individual cases. When the dispute was at its height, Henry II. caused all the personal estate and revenues of the archbishop, and of those of the clergy who declared for him, to be attached, and then further proceeded to confiscate the real estate, and to banish all the relations, household, and nearest friends of Thomas Becket, to the number of four hundred. In another case a royal decree imposes the penalty of death, or in the case of ecclesiastics castration, for the introduction into the country of any papal bull of excommunication. The power of the Crown shows itself as a rule to be so strong, that every order of banishment is effectual in its operation, and even the most powerful prelates withdraw themselves from the desperate conflict by flight. Under John all these means had become massed together and increased to an enormous extent. But this power is often checked by the feeling of the masses, by the threatening position of the French kingdom, which enters into the dispute as lord-suzerain and at the request of the Pope, by the danger which menaces the possessions of the English Sovereign upon the Continent and by internal troubles,—under Henry II., even by a rebellion of his own sons. In the course of the ecclesiastical dispute matters went at last so far that the King found himself forsaken by his secular Crown vassals, as in the case of King John, and thus the Royal power reached its lowest limit. The Church on its side does battle by interdict and excommunication, with which at first the prelates and laity who pay obedience to the royal commands are threatened; then by degrees it increases in boldness and directs itself against the person of the King. A frivolous exercise of the spiritual instruments of combat could, however, be defied even by Stephen and John, so long as the feeling and the interest of the upper classes remained on the side of the Crown. The various phases of the dispute are com-

plicated by schisms of the papacy, and, on the other side, by contentions as to the succession to the throne. The two sides may have been fairly balanced, but the decision depended finally on the internal energy of each.

VII. The final break-down of the royal ecclesiastical supremacy under John rests upon a concurrence of many circumstances, long since prepared in the person of the King. The impulse was again given by the double election of an Archbishop of Canterbury. On the 21st December, 1206, Innocent III. had dictatorially, and in a very uncanonical fashion, imposed upon the Canons who had visited Rome as a special embassy, his friend and fellow-student, Stephen Langton, as archbishop. On the continued opposition of the King to this so-called election, there followed on the 24th March, 1208, the pronouncing of the interdict. The inhabitants of the country remained, however, passive; the temporal nobles were still on the side of the King. Three years later (A.D. 1211), the dispute had progressed so far that the legate pronounced the sentence of excommunication, released all subjects from their oath, and degraded the King from his royal dignity. The temporal vassals still adhered to the King. John, just at this time, had waged two fortunate campaigns, the only successful ones of his reign. It was the grievous fault of the King himself, that brought about the final crisis. Neither in England nor on the Continent had the affairs of the kingdom ever been carried on by such ferocious means as John made use of at this time; curiously combining the cruelties of an Asiatic despot with the practices of the Exchequer of Jews. In the following year (1212), a formal decree of deposition was issued by the Pope: "*Papa sententialiter definivit, ut rex Anglorum Johannes a solio regni deponeretur, et alius, Papa procurante, succederet qui dignior haberetur. Ad hujus quoque sententia executionem scripsit Dominus Papa potentissimo Regi Francorum Philippo, quatenus in remissionem omnium suorum peccatorum hunc laborem assumeret*" (Matthew Paris, 162). King Philip and the French nobility accepted the commission with enthusiasm, and war preparations commenced in France, which gave a prospect of a repetition of the events under William the Conqueror. The feudal summons of John

on the other side, brought together in England an army of 60,000 men (Matthew Paris, 163), which had to be partly disbanded on account of the want of provisions. But, like an electric spark, a common consciousness of the unworthiness of this King flashed through the assembled masses. John himself felt this. Fear of the French military power, and of the temper of his own vassals determined him to unconditional submission. On the 13th May, 1213, the formal treaty with the papal legate, Pandulfus, was brought to a conclusion, in accordance with the papal instructions (Rymer, i. 2, p. 54). Two days later, on the 15th

May, 1213, John resigned his crown and his kingdoms into the hands of the Pope, surrendering "to the Church and the Pope his kingdoms of England and Ireland, to receive them again from the Church as a feudal vassal" (Rymer, i. 2, p. 57; Matthew Paris, 164). Stephen Langton, Archbishop and Primate, makes his entry into England, takes possession of the Archbishop's see, and absolves the King from the sentence of excommunication. The negotiations as to the removal of the interdict and the compensation to the Church, are protracted for a considerable time longer, until the crisis ends in Magna Charta.

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## CHAPTER XVI.

### *The Curia Regis—The Great Officers of the Realm.*

THE Norman government of the kingdom rested upon a combination of the relations of the military, judicial, police, financial, and ecclesiastical authority; consequently its central point was found in the person of the King. The Norman feudal phraseology, which after the Conquest pervaded all departments, introduced for the above the appellation *Curia Regis*, which, corresponding to the social, military, judicial, and administrative position of the Crown, may signify according to the context:

The *Curia* considered as (1) the Norman Court Day; (2) the Royal Court of Justice; or (3) the whole Government of the realm.

I. *The Curia considered as the Norman Court Days.* The Conqueror was exceedingly fond of pomp and splendour. "Thrice a year he wore his crown, so often he was in England; at Easter he wore it at Winchester, at Whitsuntide at Westminster, and at Christmas at Gloucester; and there were gathered about him all the magnates throughout the whole of England—Archbishops and Bishops, Abbots and Earls, Thanes and Knights" (Chron. Sax. A.D. 1086). This account of the Saxon Chronicler, often varied by contemporaries, is the pith of all that we know about the *curia* in this sense. When the festivities were passed over, this was likewise chronicled: "*hoc anno corona sua non indutus est*" (Chron.

Sax., A.D. 1111); similarly if he held his court at Christmas only (A.D. 1114). Of course the pomp of the Norman court had increased greatly since the Conquest. We know that the Dukes of Normandy held a court three times a year, at Easter, Whitsuntide, and Christmas, and united with it exchequer and judicial business. These courts were accordingly, among the Normans, customary festivals, and were therefore called in England also, "*curiæ de more*." They were to the subjects sometimes an occasion of pride and display, and at others, of national antipathy and painful remembrance of the past. The Conqueror evidently wished to accustom his subjects to the personal government of their "legitimate ruler." The oppressed Saxons saw here at first some few of their own race, and might have imagined the assembly to be the time-honoured Witenagemôte. Perhaps the summons to it was issued by royal writ, generally to the possessors of the same lordships and bishops' demesnes as in the Anglo-Saxon period (Chron. Sax., A.D. 1023). Many a proud Norman, with his princely retinue, would see in the assembly a Norman "*cour de baronie*;" but the Conqueror had taken care that it should be neither the one nor the other. The *curia* was rather, according to all authentic information, simply a court festival, the splendour of which was intended to compensate the greater feudal tenants for the want of political power and importance; as in later times under the French "*ancien regime*." "The royal order," says William of Malmesbury, "summoned all magnates to the '*curia de more*,' that the emissaries of foreign nations should marvel at the splendour of this throng and the pomp of the festivals."

This phenomenon has, at first sight, something startling in it. William the Conqueror had passed from a dukedom with legislating diets, to a kingdom with a legislating Witenagemôte. In both countries powerful estates limited the royal power in important respects. But the Norman diets were not based upon written and traditional constitutional documents, but upon the usage of the law courts and upon the custom of the country. What the Norman Crown vassals found in England was not the customary law of their own country; and the throng around the Norman Sovereign was to the Anglo-Saxon Thanes no longer their national assembly. The Anglo-Saxons no longer found a place in the council of the King, but only a tolerated existence in the position of under-vassals, which, under the system of the feudal social degrees, excluded them even from being *tenentes in capite*. For the Normans, in another direction, the precedents, upon which the old law of the Witenagemôte rested, were not "the rights inherited and liberties guaranteed from the days of

their forefathers." To both nations had been promised the continuance of their hereditary common law; but from the thrusting together of two nations and two constitutions, there resulted a neutralizing of both, and the necessity of a renovation for each. As the old constitution was merely a combination of the relations in which the royal power stood to the landed interests in the army, law court, preservation of the peace, finance, and Church; so the new one could only form itself from the new relations; and these had in every department led inexorably to a method of government by royal ordinances, and to unlimited sovereign rights of the King. We will once again summarize these stages of development.

In the department of the military organization the personal summons of the King had taken the place of the decrees of the national assembly touching war and peace. Through the feudal system the old relation of personal service had become the only valid one; the feudal vassals do their service *intra et extra regnum* on the personal summons of the feudal lord.

In the department of the judicial system the Conqueror begins with the promise to allow the "*Leges Eduardi*" to continue. This was the concession, which even the mighty Emperor Charlemagne was obliged to make in fact and in law to the peoples of his empire, viz. the retention of their hereditary common law, which was to suffer no change through mere ordinances. William might indeed deliberate with his Norman nobles upon the promise he had made; but the "legitimate" successor of Eadward could not make the confirmation of the rights of his Saxon subjects dependent upon their "consent." The same situation repeats itself whenever collisions between the laws of both nations occur, which for similar reasons must be decided by the King. From generation to generation the precedents accumulated, arising from this situation.

In the department of the preservation of the peace, the Conqueror commences his legislation with a decree which protects the lives of his Normans by a fine for murder of forty-six marks, against which the Normans were certainly not desirous, nor the Saxons able, to raise any objection. This situation repeated itself; the police-control naturally devolves upon the possessor of the absolute military and judicial powers.

In the financial department the King needed the acquiescence of the Normans with regard to the old revenues of the Anglo-Saxon kings as little as he required that of the Anglo-Saxons to the new feudal income. But the main point was, that the new revenue flowed in copiously, and that in the *auxilia*, *tallagia*, and *scutagia*, a new current income was peri-

odically raised as need required, and one which sufficed for generations for all the King's necessities.

In the department of the Church, the Anglo-Saxon King had the right of appointing the prelates, and the right to give or withhold his consent to the resolutions of the Councils; the feudal constitution subjected the same persons to yet more extensive rights; the enforcement of military discipline, sequestration, and forfeiture of all real estates.

As all these legal relations conduced to an absolute rule, so the same result was brought about by sundry social conditions, arising from the dissension existing between the nationalities. These dissensions, from the lower strata upward, pervaded and loosened the bonds of society in the counties, and consequently deprived the great vassals of the support of those below them. There were certainly about the same number of great landlords as in the Anglo-Saxon times, outwardly more brilliant and pretentious; but without the internal union among themselves which is the root of political power and liberty. There was the most splendid court in Christendom, at which, in a long and brilliant cavalcade, the rich Norman lords and prelates appeared from time to time, followed by their under-vassals and retainers, with the colours and distinctive badges of their lords. There were the same elements of possession upon which in former days was based the Witenagemôte that had degraded Eadward's authority to a shadowy rule. In spite of all this, the Norman kings rule the land by means of writs and letters of privilege, they appoint or depose year after year their bailiffs in the counties, and assemble their tenants and prelates at parades and court festivals without allowing them any influence but that derived from revocable offices and commissions. The Norman grandees lacked the support which was the life of the dynasties on the Continent; because their estates were scattered and severed, and their men divided by national antipathies. Their Norman under-vassals are at first persons hastily collected, their Saxon under-vassals yield reluctant service to a lord who has been forced upon them, and the Saxon population, as a whole, retains for generations its dislike to the whole body of the intruders. The conjunction of these relations brought about irresistibly the decomposition of the older political rights, although these had a deep historical foundation. (1)

(1) The Norman Court-days have been the subject of a party controversy from different points of view. In the time of the Stuarts it became important to oppose the highly exalted right of the Kingship "*jure divino*" by an at least equally ancient genealogical tree of parliament. The indefinite testi-

mony given by historians, severed from its connection, was accordingly rearranged in such a way that the words "*curia*," "*concilium*," and "*consilium*," were made to mean "legislative and tax-granting national assemblies."

These "armed parliaments," with



The documentary history is in harmony with this. There exist actually no laws of this period which have proceeded from the initiative and the free deliberation of estates of the realm. The formula found in one or two cases, "*consilio et consensu baronum meorum*," will be referred to later, and apart from this. The so-called laws of William I. are really proclamations, charters, and official commands, as is seen at once in the style, "*præcipio*," "*prohibeo*"—the King wills, orders, decrees. Even if sometimes a plural occurs, a "*statuimus*," "*voluimus*," "*præcipimus*," we cannot infer from this the action of a deliberative assembly. Under William II. also, such decrees do not occur; he does not even appear

their gleaming helmets, shields, and martial parades, were also an object of interest to the students of heraldry. It is part of the special business of the herald's office to find for a newly created lord, some remote ancestor, who was perhaps an under-vassal, or, in a fortunate case, a petty Crown vassal with a few hides of land, but who, in the spirit of heraldry, must have been a "lord, hereditary noble, and councillor of the Crown," in order to figure as an ancestor of equal rank at the top of the pedigree. Just as interested are our political parties of to-day in setting up an old pedigree for parliament. A view, very widely propagated at the time of the Reform Bill, represented the Norman crown as perfectly dependent on parliament. This line is taken by Allen's treatise, which was received with great approbation (*Edinburgh Review*, vol. 35): "The name, and probably also the constitution of the Anglo-Saxon national assembly, was changed at the coming of the Normans; but its functions remained the same, and continue so in our parliament of to-day."

The idea put forward by antiquaries of a feudal Estate of the Crown vassals, overlooks, in the first place, the social disparity between half a thousand petty Crown vassals and the princely earls and great lords, whom William had enfeoffed as *tenentes in capite*. The great political fact is further overlooked that the dependence of the King upon the majority of his Norman vassals would have brought about the most rigorous decrees against the rights of the Saxon population, which still formed a great portion of the feudal army, the numerical majority in the staff of the Church, and the greater part of the whole population

of the nation. So long as dissensions continued between the "Francigenæ" and the "Angli," the carrying out of the promises made to the Anglo-Saxon portion of the community could not possibly take place under a legislative assembly of Normans. In consequence of this arbitrariness position, no monarch since Charlemagne, was ever so favourably situated as the Conqueror for thoroughly organizing his empire on a uniform system. William I., and both his sons, show a practical understanding and an inexorable persistency in dealing with this question, such as are rarely found in history in conjunction with so many favourable circumstances. Once set on foot, this system of government strengthened and developed its maxims through the medium of its professional officers. The old custom of Normandy was indeed considered, but was never the decisive element where royal powers and financial interests were concerned. The Norman *Echiquier* certainly combined the court assemblies with business. After the festivities were over, it was the custom to proceed to the account table and bring in order what was owing to the lord. But in England a regular connection is not perceptible. The *Exchequer* is from the first a fixed official body with its own course of business procedure; its two principal Terms do not tally with the period of the court days, and a summons of those from whom accounts were due to the court festival was never dreamt of. In the same manner the four law Terms of the English courts of law do not tally with the periods of the *curia de more*, and this is external evidence that the later course of judicial business did not proceed from the Norman court days.

to have summoned an assembly to ratify his doubtful claim to the crown. Henry I. certainly begins his reign with a charter in which he promises much, the pith of which lies in these words: "I give you again the laws of my father; that is, the laws of Eadward, with the changes which my father has made with the consent of the vassals," wherein the one-sided character of the proclamation is distinctly prominent. Under Stephen a similar charter was issued, and nothing more. Under Henry II. the Assizes of Clarendon and Northampton contain the first beginnings of a legislation with assemblies of notables, but these tokens again disappear. Under Richard I. and John we find again only instructions to officials as to their duty, and charters. The careful investigation made by the recent committee of the Upper House upon the subject of the peerage, has led to the definite conclusion that under William I. and William II. nothing can be discovered to show the existence and constitution of a legislative assembly; but that the charters of Henry I., Stephen, and Henry II., showed that the promise of the continuance of the laws of Eadward had been regarded as the "right of the country;" and that it might be thence concluded that there existed a sort of legal constitution, of which a legislative assembly gathered together at least for certain purposes, formed a portion; and that special one-sided arbitrary imposts were regarded as infringements of the rights of the subject (Peers' Report, i. 36, 42). The chief question, how such an assembly was composed and limited, as well as the question touching the revocability or irrevocability of the royal charters and letters of grace, is not here dealt with. But the really important part of that view lies probably in this point, that even the Conquest was neither desirous nor able to abolish the highest principle of all Teutonic constitutions, viz. that the *lex terræ* cannot be altered by despotic command, but only with the consent of the representatives of the nation; "*lex ex consensu populi fit et consensu et constitutione regis*" (edit. Pistense, sec. 6), "*ut neque principes nec alii quilibet constitutiones vel nova jura facere possint, nisi meliorum et majorum terræ consensus primitus habeatur*" (Reichstag at Worms, 1231).

In times of necessity and peril the Conqueror also was obliged to pay regard to this national feeling, which can be clearly traced throughout our thousand years of German history. When he cut most deeply into the existing "law of the land" by the separation of the spiritual from the temporal courts of law, and by their subordination to the "*canones et leges episcopales*," he added, out of respect for the nation and the Church, that this was done "*communi concilio episcoporum et abbatum et omnium principum regni*." This absolute sove-

reign will certainly did not exclude the idea that the *optimates*, who were assembled at the court day, should be heard and their opinion asked in important enactments. Naturally this was done in the case of measures affecting the whole of the common law, as for example the decree in 4 William I., which confirms and modifies the laws of Eadward the Confessor. In the charter which held out so many promises at the commencement of his reign, Henry I. declares, in this spirit, that those additions were made by his father "*consensu baronum*." But the purely deliberative character of the estates of the realm is also seen in the formula. In the sole existing political act, in which William the Conqueror speaks of the "*consensus episcoporum et principum*," he confines himself to inserting this assurance into the decrees which he issues to his magistrates. In like manner Henry I. in his *charta* confines himself to the assurance that the "*emendationes legum Eduardi*" were made "*consensu baronum*." For more than a century the many hundred signatures of the prelates and magnates disappeared, by which in the Anglo-Saxon times the resolutions of the realm were confirmed and attested. No one has the right to inquire who was summoned to such a *consilium*, no one has a right to attest such resolutions. The declaration made by absolute royal authority, that the "*meliores terræ*" were present, is regarded as sufficient in form and fact. Promises that the magnates should give their consent, and guarantees for these promises, begin only after *Magna Charta*. On the appointment of high prelates the whole of the assembled notables are also heard in council; when contemporary accounts allude to the business of the *curia de more*, this is their ordinary topic; but yet this only signifies that the King appoints the prelates after hearing the "pro" and the "con." For instance, Stephen at Easter 1136, holds a *generale consilium* in the presence of eighteen bishops, and a like number of secular lords, and issues a charter for the appointment of the Bishop of Bath: "*audientibus et collaudantibus omnibus fidelibus meis his subscriptis*." Upon a new accession to the throne, or at the knighting of the eldest son, an especially brilliant company probably assembled, which might be described as an extraordinary court day. Such a one was that of 1086, which William I. summoned towards the close of his reign, for the purpose of reviewing the feudal militia and receiving the feudal oath from the vassals. Such deliberative estates could certainly by a mere change in their degrees of power again become legislating bodies. But even for this the external form was wanting from the time when the Norman kings, perhaps from fear of such a result, began to discontinue

the periodical court day. Already under Henry I., the *curia de more* was no longer regularly held. During the grievous confusion in Stephen's reign it completely ceased: "*Jam quippe curiæ sollemnes et ornatus Regii scematis ab antiqua serie descendens prorsus evanuerant*" (Huntingdon and Chron. Norm., A.D. 1139). They never revived in the old periodical manner. For the deliberations of the king with his *optimates* a body had therefore to be formed in a new fashion, and one which could attach itself to the administrative system and the existing grand offices. The constitutional rights of the English parliaments have in the course of centuries been so legitimately and honourably acquired, that they do not need any invented pedigree.\*

\* A combination of State business with the great festival gatherings certainly resulted from the nature of the State, and is also occasionally expressly mentioned. "*Peraactis igitur festivi-  
oribus diebus, diversorum negotiorum  
causæ in medium duci ex more coe-  
perunt*" (Eadmer, pp. 87, 39, 102). But we find all such mentions confined to the fact, that the nobles, assembled at the court, were asked their opinion, war or church matters were discussed with them, and judicial commissions appointed from their numbers; but of a constitutional right of assent to acts of legislation there is nowhere a trace. On the occasion of the accession of a king, and at his coronation, a form of election or acclamation was retained, and continued as a very ancient ceremony, but it had certainly no greater significance at this period than in the Anglo-Saxon (Eadmer, p. 81). The remaining instances of an association of State business with the court days are principally the following: A.D. 1070, when the subjection of ecclesiastical property to the feudal burdens was decided upon (Matthew Paris, A.D. 1070, whose statement, however, is for good reasons called in question by Stubbs); in the same year the hearing of a lawsuit between the Archbishop of York, and the Bishop of Worcester occurs; A.D. 1096, the hearing of a duel accusation brought by Geoffrey Baimard against William Count of Eu; A.D. 1106, proceedings relating to the reunion of Normandy; A.D. 1107, for the regulation of ecclesiastical disputes; A.D. 1123, for the appointment of the primate; (A.D. 1124, a "witenagemote" at which forty-four thieves were hanged, was certainly not a court assembly, but an extraordinary

legal assize); A.D. 1136, under Stephen, for the ratification of the election of the Bishop of Bath: the charter drawn up on this matter concludes with the words: "*audientibus et collaudantibus omnibus fidelibus meis his subscriptis, apud Westmonasterium in generalis concilii celebratione et Paschalis festi solennitate hoc actum est*," etc.: there were present thirteen English and five Norman prelates, the chancellor, three earls, two constables, four court officers, and six barons; A.D. 1155, at the proclamation of the two sons of Henry II. as successors to the throne; A.D. 1164, the extraordinary Assizes of Clarendon and Northampton are special gatherings of notables, in consequence of the peculiar state of the ecclesiastical controversy. The older polemic treatises, such as Petyt's "*Rights of the Commons Asserted*," Brady's Tracts, etc., treat all such *concilia* as legislative Norman parliaments. In modern times the "*Edinburgh Review*" has repeatedly recurred to this view. Hallam, on the other hand, is somewhat reserved, "*Middle Ages*," Note X. In the "*Peers' Report on the dignity of a Peer*," the question is treated with critical caution and legal perspicuity. An authentic digest of all the notices of *concilia*, from the Conquest to Magna Charta, is given by Parry, "*The Parliament and Councils of England*," London, 1849, pp. 1-23, in which the uncertainty and informality of these assemblies and deliberations is made perfectly clear. The most recent historian, Bishop W. Stubbs, treats of the Assizes, I. 356-358, 369, 376, repeatedly both in his "*Constitutional History*," and in his "*Select Charters*." But whilst in one passage he confesses to the purely

II. *The Curia Regis* as a Constitutional Central Court of Law would naturally have combined with a Norman parliament, if such an institution had existed, after the fashion of the Anglo-Saxon Witenagemôte. The function of a court of law was and remained the very kernel of every Germanic form of constitution; judicial proceedings formed the current business of every national assembly. An object for this judicial activity existed beyond doubt, for the "*Leges Eduardi*" comprehended the old jurisdiction of the "King in the Witenagemôte" in cases of a *defectus justitiæ*, of denial of justice, and of a claim for justice against overpowerful persons. This department was now even extended by the reservation of royal jurisdiction over Crown fiefs, and by further reservations in civil and criminal causes. But the traditional mode of holding a King's court in the Witenagemôte had become inapplicable. The Norman lords, whom the King now gathered about him, might represent many things; but they were not the "Witan of the country," the highest bearers and depositaries of the Anglo-Saxon common law. For all the highest decisions according to the "*Leges Eduardi*," they were altogether incompetent. The King could not declare any body of Norman lords a permanent central court of law without proclaiming a *jas iniquum* as a principle for the country. Equally inapplicable was the kind of court customary on French soil. Had it been possible to constitute a great princely feudal court, like those which sprang up in France around the great ducal families, this would certainly have been to the interest of the Crown vassals; for out of such a "*cour de baronnie*" a political body of great importance would have immediately arisen, of whose enactments the history of this period would have had much to narrate. But the Crown vassals, more than five hundred in number, were entirely unsuited for such a purpose. The Norman Eorls and great vassals, in their almost princely position, would never have

"nominal" character of this co-operation, in which only the theory and form of a national assembly are retained in memory of an old Germanic political idea (Hist., i. 856, Charters, 17), in other passages the traditional ideas as to the Norman parliaments are repeated without material alteration (Hist., i. 276, Charters, ii. 23, and in other places). Against the direct evidence that in the Norman period the royal right of decreeing exhaustively controlled all departments of the Government, a constitutional lawyer, like the author of the great Upper House Reports on the Peerage,

might perhaps endeavour to bring counter evidence. But the mere repetition of the traditional assertions cannot be received as a counter proof. Still less is the question suited to elaborate discussions in essays and in the daily press, even though they be received with never so much "approbation." An accurate history of the Anglo-Norman period is impossible, if all the rights which, laboriously advancing step by step, have been acquired for the popular representation, are by a fiction presupposed as already existing.

thought of regarding a few hundreds of Norman horsemen and upstarts as their equals simply because, by holding a single estate, these men had become *tenentes in capite*, or immediate soldiers of the King. Even in the thirteenth century the creation of such a "peerage" utterly failed. Such an informal body would have lacked also the necessary legal qualities; for the judicial decisions involved not simply feudal customs, but also most difficult questions of the old common law, as well as still more difficult and conflicting questions arising between the "*Leges Eduardi*" and the existing feudal law.

For obtaining proper legal decisions, there was accordingly nothing left but a small selection of lawmen. Among the numerous spiritual and temporal vassals a number of suitable and experienced men might be found, to deal with each individual case. Among more than five hundred vassals, who were, according to the right inherent in the grants of land, certainly in form *pares* among themselves, the selection of lawmen took of itself the shape of a commission for individual causes. The royal appointment moreover clothed even minor vassals with the requisite authority. The great vassal was obliged to recognize each man so appointed as a *judge*, even though socially he would never have recognized him as his equal. In truth, the position of the great feudatories among several hundred petty ones was not by any means pleasant, and hence it can be explained why the great lords preferred submitting themselves to the judgment of the King rather than to that of a miscellaneous commission, which never inspires confidence in its administration of justice. Of so little practical value was this "*judicium parium*" acting by commission, that in later times *Magna Charta* in its 39th article mentions the "*judicium parium*" of the "*liberi homines*," but no especial "*judicium parium*" of the Crown vassals. To this was added the fact, that the great Norman lords found small pleasure in occupying themselves with legal questions, when such questions did not concern their native law and their feudal customs, but only the local, and legal business of a foreign place. Hence most of them probably preferred the military pomp of the court days to magisterial duties; to many of the lords the new order of things was so distasteful that they gave up their fair possessions on English soil and returned to the Continent. Still less had the kings an interest in constituting formal judicial assemblies from the vassals at court. For two whole centuries they systematically strove against the creation of great feudal *curiæ* in the counties, until they attained their object in the statute of Marlebridge by forbidding every appeal to the

greater feudal *curiæ*. For political reasons, they could still less tolerate the creation of a central "*cour de baronie*." They much preferred to leave to a pliable administrative justice all decisions, which, in one form or other, could be properly referred to it. Where the immediate royal right to property, or a *debitum regis*, was concerned, the Exchequer decided with more certainty for the interest of the King; and since the "*sedentes ad scaccariam*" were also Crown vassals, and also tried cases in judicial form, and were likewise justices as well versed in the law as the members of a specially constituted judicial commission, the position of the Exchequer, as a "*judicium parium*," could not formally be called in question. The official title, "*barones scaccarii*" was perhaps originally chosen to express this qualification of its members to pass judgment upon the Crown vassals. Where the financial system was not concerned, it was in other respects much more convenient to assign the Crown cases reserved to the county courts; besides, in the earlier generations it was not possible to dispense with the co-operation of the county courts, where local affairs and Saxon customary laws were concerned. The *Vicecomes* presides over the trial by a royal writ with his lawmen in the ordinary manner, but only in virtue of a special commission: "*hæc dominica placita regis non pertinent Vicecomitibus sine diffinitis prælocutionibus in firma sua*" (Hen. I. 10, c. 8). It was not until the time of Henry II. that, together with the system of itinerant judges, the general centralization of royal justice in the staff of the judges took its rise. (2)

(2) A supreme feudal court was also necessary in England, since the Crown vassal can claim to be judged only by his *pares*. The under vassal can never sit in judgment upon his own feudal lord (Hen. I. c. 82). But if on the Continent a standing, or at least a periodical feudal court arose out of this right, this was only in consequence of the different territorial institutions which existed there. In England the *judicium parium* became established in consequence of the scattering of the great feudal possessions throughout several counties, so that every Crown vassal found his *pares* in his own county, and also a royal *Vicecomes* or commissioner among the vassals of the Crown as the representative of the King. According to this arrangement, the county court was the regular forum of the Crown vassals, and so the personal suit of court owed by all temporal and spiritual vassals of the Crown was strictly in-

sisted upon (Hen. I. c. 7, sec. 2). The great majority of their law-suits continued for a long time to be in reality settled in the county court. The records of the proceedings at law recorded by Palgrave, vol. ii., show us that, in addition to these, special judicial commissions were comparatively rare; the admission of them, side by side with an established feudal court, would be perfectly inexplicable. Just as incompatible with a fixed and stationary "*cour de baronie*" would be the judicial jurisdiction of the Exchequer, the structure of the whole administrative law, the police system of arbitrary amerciaments, and all the later incidents, from which a court of peers hardly succeeds in emerging with endless difficulty and fluctuations in the course of centuries. It is true that this condition of a supreme central jurisdiction wielded by commissions and the Exchequer exhibits a bad judicial system, which

With these views the historical evidence also tallies. We find the royal judicial control only exercised in the form of commissions, and then only in those comparatively few cases where actions were brought by the most powerful and favoured vassals of the Crown. In all cases of which we have record these commissions are of such a temporary character in respect of their personal composition, form, and principles, that the idea of a permanent court of justice of Norman peers would never have arisen from historical testimony, if it had not been thought necessary to interpolate the missing pieces of evidence from institutions of the Continent and of later centuries. Under William I. a dispute between the Bishop of Rochester and a sheriff was referred to the county court for decision, the Bishop of Bayeux presiding on the occasion. The decision of a suit of the Archbishop of Canterbury on a matter of deprivation of lands, was delegated to a court composed, under the presidency of the Bishop of Coutances, of several bishops, Crown vassals, the sheriff, the "whole county" of Kent, and notable persons of other counties. Under Henry I. the Bishop of London receives a royal command, to allow the Abbot of Westminster his right, "otherwise the Exchequer will pass judgment." William I. arrests, at a court day, even his own half-brother without a judicial proceeding. In like manner, in 1137, Stephen arrests his nephew Roger, the chancellor, and two bishops, "*et commisit eos custodiis, donec dederent castella*." Reserving a final sentence pronounced by judicial peers, the King thus decides extraordinary cases either in person, or by writ, or by a judicial commission delegated for the purpose. Under Henry I. high prelates travel across the seas, to lay litigated cases before the King, and decisions which the King pronounces in Normandy by writs *de ultra mare*, are still quite usual under Henry II. and Richard I. For the course of business of the royal judicial commissions the documents reprinted in Palgrave, vol. ii., are so far of importance that they testify to very informal proceedings taken by the commission, which would be inconceivable if at the King's court a feudal tribunal with permanent officials had existed as an established, or at

together with the dismembered form of the county courts affords an evil picture of the whole. But this picture truly represents the state of affairs, which only becomes less gloomy after Magna Charta. The judicial administration was, and continued to be, the weakest part of the Norman government, in which the formal retention of the "*Leges Eduardi*" was incapable of

remedying internal injuries, the unreliability of the constitution of the courts, and the mercenary spirit of the whole system. The Norman, at all events, found in the greedy Exchequer, and in the fee-exacting district governor, his countryman, his comrade, and his compeer. But how stood it with the less fortunate Saxon Thane and Ceorl?



least a periodical court of law, which like every feudal *curia* would have formed for itself a fixed and formal procedure.\*\*

The negative result accordingly is this, that under the name "*curia regis*" there existed a wide judicial authority, residing in the King, of personally appointing and constituting the court in numerous important cases; but that this *curia regis* did not consist of the collective body of all vassals of the Crown, who in their present form constituted no exclusive body; nor of a definite number of great vassals, for at that time there was no precedent for a legal separation of the greater from the lesser vassals; nor of a definite number of great officers of the realm, for the great offices were at that time not so constituted that it was possible to form on their basis a permanent court of peers.

In this connection it becomes clear how in England the judicial supremacy of the King could extend and become centralized so far beyond all the limits of the Germanic constitutions of the Middle Ages; how, contrary to all principles of the Germanic *ordo judiciorum*, the King so often sits in person in court, and personally takes part in giving judgment; how the forms of a rescript procedure by writ arise, and even direct justice by means of rescripts; how for cen-

\*\* As evidence how on the other hand "*Constitutional History*" regards the formation of the *aula regis* or *curia regis*, I content myself with referring to the following authorities: Bowyer, "*Constitutional Law*," p. 243, and Millar, "*English Constitution*," vol. ii. cap. 3. "The administration of justice in the final instance, belonged originally to the great council. It was the King's baronial court and his *tenentes in capite* who were the *justices* and judges" (Allen, in the *Edinburgh Review*, xxvi. p. 364). "The committee of the Upper House confines itself to accepting an *ordinarium concilium* of the King, which consisted of the great officials and a smaller number of prelates, barons, and *justiciarii* learned in the law. This select council was at the same time the supreme court, called *Curia Regis*, which generally met three times a year—at Easter, Whitsuntide, and Christmas" (Peers' Report, p. 20). This confusion is due to the fact that later, under Henry II., a body of official *justiciarii* was formed, and that consequently the later legal works of Glanvill and Bracton, treat of the *curia regis* in the form of a permanent body. These official judges are erro-

neously represented as the immediate successors of the great barons in Norman feudal *curia*. As a proof that such a permanent tribunal of peers had after the Conquest really become formed, fragments of the feudal constitutions obtaining on the Continent are quoted. But what became of this powerful permanent body afterwards? The so-called history of English law offers no explanation (Parry, "*Parliaments*," p. xii), (Foas, "*Judges*," i. 20). Whether it was from the feeling of their incapacity in the face of the science of jurisprudence that was now beginning to arise, or whether it was from increase of business in the court, we are told that at all events "the great barons gradually withdrew." Whilst the later barons of the fourteenth and fifteenth centuries seek to gain their political influence by personally taking into their hands, and that with the most unexampled zeal, the conduct of political and judicial business, by which they finally acquire the privileges of a court of peers, the barons of the twelfth and thirteenth centuries are declared to have begun their political career, by withdrawing from the tribunals!

turies afterwards the highly personal character of the court-tribunal is retained in the Constitution, as that of a tribunal, "*ubicunque fuerimus in Anglia.*" Hence can be explained how Bracton, Fleta, and the later law books do not regard the royal office in the strict formal sense of *holding* the court, but as a duty of administering justice itself: "*nec potest aliquis judicare in temporalibus, nisi solus rex vel subdelegatus*" (Fleta, i. c. 17, sec. 1). From this justice which is concentrated in the person of the King, there arises at a later period under Henry II. a court of justice composed of official judges, which, as the records inform us, arose in quite a different way, and not as a continuation of a permanent court of peers.\*\*\*

III. A *Curia Regis* considered as a Supreme Government Council, in which the central conduct of all the State business is comprised, would have developed itself, as in France, from a permanent feudal Court of Law, had such an institution really existed in England. But since the court days of the King are assemblages of pomp, since the royal judicial power is exercised by commissions, the very elements of a formal royal council of the realm were wanting. Granted, that the person and the dignity of the monarch, even in the court festivals, can never be entirely separated from the cares and business of Government;—still a continuous deliberation of the king was also indispensable, apart from the court days, owing to the intricate legal business of a kingdom constituted like England. Hence there existed beyond all doubt from the first, a *Consilium Regis*, only not in the sense of a fixed body, determined by property or office; but simply in the sense that the king had at his side a small number of chosen spiritual and temporal vassals to deliberate with him; a *consilium*, whose constitution and method of proceeding was still somewhat indefinite, and varied exceedingly according to the character of the King. There existed at every given point of time a sort of *conseil du roi*, which the feudal language designated as the *Curia Regis*, but which varied every day according to the will of the king, as according to the letter of the law is also the case with the Privy Council of our own day. (8)

\*\*\* The only correct element in that fanciful image of an *aula regis* is limited to this: that the hearing by commission of the Crown cases reserved the method of procedure by writs, and the ordinary administration of the sheriff's office by temporal vassals of the Crown gave rise to a narrower circle of prelates and barons, learned in the law, who were generally employed

in judicial business. A body of persons like this was the natural forerunner of the *justiciarii* of later times, and of the "bench" of justiciaries, afterwards formed. Madox (i. 6) is, as usual, nearest to the truth; he always quotes soberly from the Exchequer records.

(8) The *curia regis*, in the sense of the supreme council, can be just as little traced back to a corporate body,

That this view is correct is convincingly shown also by an examination into the nature of the great offices, which in their Norman form could as little constitute a permanent council as a permanent court of law. Seven great offices are mentioned; but they partly lack a permanent character, and are partly limited to very definite and particular business.

1. A *Justiciarius totius Angliæ* occurs at an early period, but only as the King's representative, appointed by commission for a time, and frequently together with others. For a long time, too, there is no fixed appellation for such a general governor, for whom, according to the taste and style of the writer, sometimes one and sometimes another Latin expression is used. The frequent absence of the kings in Normandy made a representative often necessary. But it was not until Henry the Second's reign that R. de Beaumont, and then R. de Luci, and in 1180 R. de Glanville, were definitely described as "*Summus Justiciarius totius Angliæ*." Richard I. at his accession appoints a bishop and an earl, and associates with them (*associat eis in regimine*) five barons. Subsequently, on his departure into Normandy, he appoints two other bishops and four barons; from Palestine he adds to these the Archbishop of Rouen. Later, Archbishop Hubert becomes *Summus Justiciarius*. The patent still exists (15 John) which appointed the Bishop of Winchester "*Justiciarius noster Angliæ, quamdiu nobis placuerit, ad custodiendam loco nostro terram Angliæ*." It was not until the time of Henry II. that the office appears to have been regarded as a Government office; after Henry III. it ceased to exist. (a)

as can the supreme feudal tribunal. It was first of all the minority of Henry III. that rendered it necessary to create a formal *consilium regis* as a council-regency, consisting of prelates, vassals, and persons learned in the law. The Permanent Council that was afterwards formed on this precedent, give rise to an erroneous idea of a permanent council as a constitutional department during this period. Here, too, it is difficult to meet such deeply rooted political convictions, otherwise than by giving the following survey of the great offices which actually existed, and which were composed of a haphazard collection of temporary representatives, and court and feudal offices.

(a) The *Capitalis Justiciarius* is so treated by Spelman (pp. 405-418) that a certain continuity in the office appears to be proved by what he says. But under the earliest reigns, only a temporary representation of the King

is spoken of. In the year 1067 William I. appoints Bishop Odo and W. FitzOsbern, *custodes Angliæ* (Hoveden, i. 450). The Saxon Chronicle says of Odo "*Cum rex in Normannia, fuit ille primus in hac terra*." In 1073 W. de Warenne and R. de Benefacta are denoted as "*Vicarii Regiæ*," or "*Præcipui Angliæ Justiciarii*." Under William II., Flambard, a chaplain of the King, is mentioned as "*Placitator et Exactor totius Angliæ*," or "*Regiarum opum Procurator et Justiciarius*." Under Henry I. Bishop Roger is called "*Justiciarius totius Angliæ et Secundus a Rege*." Under the same king R. Basset and others are also mentioned in a like capacity. In 1153 Stephen appoints his successor by agreement, "*Justiciarius Angliæ*,"—at least Hoveden asserts this, although the agreement that had been concluded contains nothing about it (Foss, i. 145). A good survey of these early general governorships is to be

2. The *Seneschallus totius Angliæ*, Lord High Steward, *major-domus*, appears to have been from the first an hereditary office. The Norman kings were the richest lords in Christendom, and their social position in itself demanded that they should be surrounded with court offices; some of which, according to the ideas of that period, were required to be quite as hereditary as the Crown which they served. A seneschal, a marshal, a chamberlain, a butler, were all the more necessary to the royal Crown and dignity, as the great vassals were themselves surrounded by similar officers. Beyond doubt an hereditary *major-domus* had previously existed in Normandy. But the office was of such little political importance, that the seneschal of William I. cannot be identified. Under William II. it is said of Eudo "*major-domus regis, quem nos vulgariter Senescallum vel Dapiferum vocamus*;" and an old record quoted in Coke testifies: "*Senescalcia Angliæ pertinet ad comitivam de Leicester et pertinuit ab antiquo*." On the condemnation of Simon de Montfort at the close of this period this hereditary office became extinct. (b)

3. The Lord Great Chamberlain. The royal household had from the earliest times a separate administration (*Camera*) for certain estates, dues, payments in kind, and personal expenses of the King. The managers (*camerarii*) are personal officers of the King, but the place of the first among them (*magister camerarius*) becomes in accordance with the tendency of all court offices, an hereditary office. Thus Henry I. grants to Alfred de Vere "*Magistram Camerariam totius Angliæ in feodo hereditario tenendam*;" and so it remained down to the time of Henry de Vere, eighteenth earl of Oxford. But since the hereditary office becomes, as usual, a mere honorary place, there arises for the real administration of the *camera*, a new personal office of *camerarius regis*, King's chamberlain, who has also a place of honour in the Exchequer, in which his

found in Foss, i. pp. 11-20 *et seq.* The important circumstance is also brought into prominence, that those persons whom the historians mention as *summi justiciarii*, sign the charters as witnesses, without adding this title (Foss, i. 85); and also, that the title *justiciarius* actually never occurs in the charters of William I., and very rarely in those of William II. (Foss, i. 90). But under Henry II., together with the radical changes introduced into the central government, the *summus justiciarius* appears unmistakably as a formal governmental office (Foss, i. 169). The order from that time onwards is given by Foss, i. p. 170, *seq.*, ii. p. 23, *seq.*

(b) With regard to the *seneschallus totius Angliæ*, cf. the references in Madox. Grentismenill is mentioned as seneschal of William I., but in different places other persons. After the extinction of the office in the person of Simon de Montfort, it came later by re-grants to the house of Lancaster, became extinct with the accession of that house to the throne, and was subsequently only granted on the occasion of great ceremonies, *pro hac vice*, notably at coronation festivals. A detailed description of the royal household under Henry II. is to be found in the *Liber Niger Scaccarii* (edit. Hearne).

and the Lord Great Chamberlain's under chamberlains, or chamberlains of the Exchequer, are employed as keepers of the chest. Under the Plantagenets this King's chamberlain becomes an active Lord Chamberlain. (c)

4. *The Constabularius totius Angliæ*, Lord High Constable, *Connetable* of England, cannot be shown to have been an hereditary office in the earlier Norman reigns. In Normandy it appears to have existed; in England the creation of such an office was against all the principles of the Government. *Constabularii* are, it is true, mentioned often enough; for every command forms a "*constabularia*," the command of a troop, a castle, a garrison, or even of a ship (*constabularia navigii regis*). It was not until the time of the concessions in Stephen's time, that a *constabularia* appears as a family office, and under Henry II., one or two *constabulariæ* are beyond all doubt bound up with the possession of a group of knights' fees. But the privileges attached to the office appear to have been only two:

(a) A post of honour as Great Constable of the feudal militia on its peace footing, with no right to command, but some military jurisdiction, and with the duty of keeping the rolls of attendance and similar administrative functions, which were performed by representatives. Real commands are always based upon royal commission.

(β) A place of honour in the Exchequer with formal duties exercised by representatives. Thus the *constabularia* arises in the Exchequer, and in the Court of Common Pleas also, after their separation. But the constable is only an active member of the Exchequer by virtue of special appointment.

In this sense the Bohuns held the hereditary office until 1371; then it passed through female succession into the royal family; and thence to the Stafford family, in which it became extinct in 1521. (d)

5. *The Marescallus Angliæ*. An hereditary military marshal no more existed originally in England, than an hereditary constable. The conquering army, it is true, had

(c) As to the Great Chamberlain and the Camerarii, cf. the references in Madox. After the death of Henry de Vere, eighteenth earl of Oxford, the hereditary office became divided owing to female succession; it exists to the present day with certain fees and functions at the royal coronation.

(d) As to the *Constabularius Angliæ*, Spelman, "*Glossarium*," pp. 183-186, gives us a mass of miscellaneous information. Thus much is proved, that it was not until Stephen's time that an hereditary *constabularia* can be said to

have existed, in the person of Milo of Gloucester. His father, Walter, was described in the history of an old abbey, as "*constabularius princeps militie domus regie*" (Foss, i. 123), which description, again, is capable of various interpretations. A family right to a military command has, as a fact, never existed in England. The report of the committee of the Upper House conceives the *constabularia* as comprising a sum total of services which the King could at pleasure accept or reject (Peers' Report, iv. 269-270).

its marshal (R. de Montgomery). But the idea of a family office is not met with until Stephen's time, when (together with Milo of Gloucester as high constable) Gilbert de Clare is mentioned as marshal, and the office is continued from that time to his descendants. On the other hand it appears that from the first an hereditary royal marshal's office had existed; an office, which, considering the importance of the royal stables, could hardly be omitted in a court household, according to the social notions of those times. The title is certainly very indefinite. Every office for the management or provisioning of a number of horses is called a "*marescalcia*," and we even meet with a *marescalcia avium* and a *marescalcia mensuræ regis*. Beyond doubt, however, a first court marshal existed, whose office consisted in protecting the person of the sovereign, assigning apartments in the palace, and in maintaining the peace of the royal household. This first marshal was called *Magister Marescallus*, or simply marshal, and since he bore the name of Marshal as a family name, probably possessed the office as an hereditary one. But since, after that time, the family of the Marshals (court marshals), and the Clares, Earls of Pembroke (military marshals) became united by female succession, thenceforward, either intentionally or by accident, both offices became blended together in one Earl Marshal. The duties are then threefold:

i. A post of honour in the feudal militia, coming immediately after the constable, with the duties of keeping the rolls of attendance, etc., which were exercised by proxy.

ii. A post of honour in the Exchequer with formal duties, also undertaken by representatives. Thus arose the Exchequer Marshal, who had the right of taking into custody those from whom accounts were owing. After the later division of the governmental departments, the marshals of the English law courts of to-day proceeded from this office.

iii. A supreme post at court, which together with the right to fees and the appointment to certain offices, constitutes to this day an hereditary office. (e)

6. The Chancellor, *Cancellarius Regis* is the pre-eminent

(e) On the subject of the *Marescallus Angliæ*, Madox gives us a number of reliable data, which form the basis of later statements. Later on the anomaly arose, that the earl's title of the Pembroke family (at a time when this was a very lofty and rare title in the land), bound up with their hereditary office of court marshal, became united under the title of earl-marshal, which is met with as early as Henry III., and is used in later times in letters

patent. Here again the existence of several marshal's offices is perplexing. Under Henry I., Wigan, the marshal, was enfeoffed of certain estates for his marshal's office. A second, apparently a lower marshal's office, we meet with in the family of Venuz, which according to a later statement laid claim to the "*magistra marescalcia*," but is said to have had its claim rejected (Charta I. Joh.).

spiritual personage of the court of the Middle Ages; as is also his office in the court of the Queen, in that of the dignitaries of the realm, and great vassals, in contradistinction to whom he is called the "*Regis Cancellarius*." His original position is that of a first chaplain, *Chef de la Chapelle du Roi*. But as all writing was originally in the hands of the clergy, the chancellor, in his capacity of private secretary, conducts the correspondence of the King with the Exchequer, the under-officials, and private persons. He is accordingly a court chaplain, in later times generally a bishop or an abbot, and has a seat in the Exchequer; from the time of Henry II. he becomes a principal personage in the formation of the administrative departments. His office is and remains a revocable office of trust, and is sometimes granted in return for a fine, in the amount of which the increasing importance of the office is apparent. As early as Stephen's time, a chancellor pays 8000 marks for his office. In 7 John, Walter de Grey pays 5000 marks for the office of chancellor for his life—a method of grant, however, which was soon discontinued. Occasionally a vice-chancellor is also mentioned; and further, a *Clericus Magister Scriptorii*, who acts also as Clerk of the Exchequer; a *Scriptor Rotuli de Cancellaria*, and others. (f)

(f) The Chancellor, *Cancellarius Regis*, is treated of in detail by Spelman (p. 127-135), who gives a list of the chancellors down to James I. Here also the pedigree of the office has been traced too far back into the past, for the *capellani regis* of the Anglo-Saxon period are represented as chancellors of the realm. It was not until the last generation of the Anglo-Saxon period, that the *Capellanus*, *Sigillarius*, *Notarius Regis*, is so frequently mentioned that the existence of an established secretarial department in the government can be assumed (Kemble, *Anglo-Sax.* ii. 97). The Great Seal which is delivered to the chancellor, and has later its own history, dates from Eadward the Confessor. Hardy (1848) was the first to publish an exact table of the Lord Chancellors and Keepers of the Great Seal, and Lord Campbell to write their lives (London, 1845-1847). A list of the earliest chancellors has been carefully compiled by Foss ("*Judges*," vols. i. and ii.). Under the early Norman reigns, the chancellor still appears as an official of the second degree, whose signature occurs after those of the bishops and earls, and having a seat among the barons of the Exche-

quer. The chancellors of this early period were advanced in later times to bishops' sees. It was, however, already an important office; one in which the chancellor, as cabinet-councillor, generally managed all that related to the papal throne, and transacted such cabinet business as required a knowledge of law. By the middle of the period, the position had become so much enhanced in dignity, that the most eminent bishops, and even archbishops, fill the office of chancellor. Nevertheless, the chancellor remains a member of the Exchequer, and under Henry III., also exercises the functions of an itinerant judge. Under Henry III., a chancellor was once appointed to whom the King either could not or would not entrust longer the conduct of the business appertaining to the office; and so the expedient was resorted to of appointing a "*custos sigilli*," who discharged the principal business, without receiving the title of chancellor (Foss, ii. 137, *seq.*). From this period there dates also a distinction, which can never be clearly established, between a chancellor, and a "Keeper of the Great Seal." A vice-chancellor is also met with once incidentally under

7. *The Treasurer*, generally a cleric, appears under Henry II., and even earlier, as one of the barons of the Exchequer, among whom he is especially singled out. Bishop Nigel obtained the office for his son, the author of the "Dialogus," in return for a fine of £400. In its later form it increased in importance together with the finances, so that at last it culminated in the office of Prime Minister of the country. (g)

A survey of these great offices shows us that they were neither contemporaneous nor homogeneous. They rather point decidedly to a concentration of authority in the head of the Government. When deliberating upon important military affairs, the King would certainly not pass over the high constable; when dealing with foreign affairs, especially the relations to the papal see, he would not easily disregard his chancellor, or the primate; in financial questions, he would not overlook his treasurer. But all the historians mention only single individuals as influential counsellors, and these, too, are described as being constantly changed. The important offices have, on the whole, so much the character of a revocable commission, and the few hereditary offices have relatively such unimportant actual duties attached to them, that a permanent constitutional body could not be created out of them. The assumption of the existence of a permanent royal council, under the name of a "*Concilium Ordinarium*," or "select council," is rather an anticipation of the result of circumstances which only developed in later times, in the order which I will proceed to state.

Under William the Conqueror everything indicates a

Henry II. (Foss, i. 160). From this, under Richard I., a formal official position is created (Foss, ii. 21); but one which again ceases. The *clericus cancellarii*, as representative of the chancellor in the Exchequer, is mentioned in the "Dialogus de Scaccario," i. 6, as being even then an important officer.

(g) The *Thesaurarius Regis* is described in the complete accounts given by Madox, to which we shall again refer in the following period. Deficient as the information respecting these great officials is as a whole, yet this much is clear, that the persons who really administer the business of the Government, and exercise an important influence upon it, are revocably appointed servants of the King, or officials appointed by commission. The hereditary offices have only a subordinate position in the financial, military, and judicial system, and are not so numerous as in other countries; they are divided into two classes:—

i. *Grand Serjeanties*, corresponding with the higher household ministers of the Continent, high steward, great chamberlain, constable, marshal, butler and others, and which are invariably combined with the tenure of knights' fees.

ii. *Lower Serjeanties*, corresponding to the lower ministers in their various degrees, and combined, not merely with knights' fees, but also with other possessions which were free of service and scutage.

The system of management of the Norman kings, however, did not allow serjeanties to be created in too great numbers, and conceded to them neither considerable possessions nor an influence upon the government of the State. From political reasons it is probable that in the course of the Middle Ages, more serjeanties were turned into fees owing military service, than new ones created.



"*gouvernement personnel*," rendered necessary by the complete change of the whole political system, in which the King feels himself strong enough to leave behind him in the times of his absence some great vassal as governor in his stead.

Under William II. this was avoided, and a royal chaplain was empowered to conduct the business of the State, in which the oppressive fiscal system and the firmly established bureaucratic institutions of the Exchequer become developed.

Under Henry I., and the long rule of his grand-justiciary, Bishop Roger of Salisbury, the Exchequer became established as a permanent general *directorium*; which may be compared with the German central military and demesne chambers, and which was at that time the only permanent central department of State (*curiarum omnium antiquissima*), the other business of the central government being conducted by the King, with counsellors whom he frequently changed.

Under Henry II., the Exchequer is further developed into a department, organized in corporate fashion, with periodic sittings for the financial administration and similar business, and into a corporate royal court, while the other business of the central government is still carried on by the King with counsellors whom he frequently changes.

Under Henry III. a government council was first formed as an administrative body for the discharge of the whole business of the State, which formed a basis for the administrative nature of the permanent councils of later times.\*\*\*

\*\*\* Though in direct contradiction to the character of the offices, it is almost impossible to eradicate the view which insists upon a permanent royal council in this period. So soon as the King discharges the current business of Government with a small number of State officials, the existence of a properly constituted "*Concilium Ordinarium*" or "Select Council," is immediately assumed. So soon as he appoints a judicial commission, this is again at once taken to be a "*Concilium Ordinarium*," either identical with the former or independent of it. If the King only once in deliberation with a meeting of counsellors, composed of prelates and barons, settles important measures, this is regarded as a "*Magnum Concilium*," almost identical with the Upper House of later times. Where historians speak of any great gathering, on the occasion of a festival or of a critical state of the realm, a "*Commune Concilium*" is made out of it; which is either supposed to comprehend the collective body of the Crown

vassals, or something more or less. Even Parry, who in other places is so clear-headed, is unable to keep clear of this traditional method of regarding things. "The first was the King's Ordinary Council, consisting of prelates, earls, and barons, selected by himself, and assisted by the chancellor, chief justiciary, the judges, and other officers of State. It was not only a Council of State, but the Supreme Court of Justice, and met three times every year at the great festivals of Easter, Whitsuntide, and Christmas; sometimes at Michaelmas, and at other times also by adjournment.

"The *Magnum Concilium* was a larger assembly of persons of rank and property, convened on extraordinary occasions.

"The *Commune Concilium* was a still more numerous body, collected together for more general purposes" (Parl. p. 10).

It is difficult altogether to form any definite ideas from this. Similarly, Hallam (Middle Ages, ii. c. 8, note 13) distinguishes between a *Commune Con-*

## CHAPTER XVII.

Transitional Period—Itinerant Justices—Justices in Banco  
—Origin of Estates of the Realm.

HOWEVER strong the Norman State, by its institutions, might seem to its contemporaries, yet the weakness of a purely personal Government, which was ever losing its support at the death of the ruler, soon began to be apparent. A recognized and duly entitled monarch, and a powerful personality, are the necessary conditions of such a government. Both these elements were wanting in Stephen, whose usurpation of the throne brings about a conflict which, with few pauses, fills up the whole of his reign. It is in England the period of sword law and similar to the interregnum in Germany. The poor rural population were compelled to do villein services, not for royal castles, but for the strongholds of the petty lords. "*Erant in Anglia fere tot tyranni, quot domini castellorum.*" A principal condition of the tardily concluded peace was the razing of the new fortresses, the number of which amounted to 126, and according to other accounts to 375, or even to as many as 1115. We can understand the satisfaction with which, after such a state of things, the people hailed the undisputed succession of Henry II. to the throne, and the concord which subsisted between him and his realm.

Henry II. seems from the first to have found the best security for the new throne in reforms affecting the administration of the realm, which, especially after the commencement of his conflict with the Church, are of a sweeping kind. About a hundred years after the Conquest three changes are almost simultaneously introduced, which, although they have

*cilium*, consisting of all the Crown-vassals; a *Select Council* for judicial and administrative purposes; and a *Court of King's Bench*, which is said to have separated itself from the Select Council in Henry II.'s reign (cf. also Stubbs; Index, s. v. "Council"). The error lies in the pedantic interpretation which would create constitutional bodies out of a government with changing counsellors. The shapeless form of the Norman central govern-

ment has brought later historians also into the difficulty how they are to denote the relation of that permanent official body, the Exchequer, to the so-called *Curia Regis*. Madox (i. 154) expresses his views with great caution, calling the Exchequer a portion, or a limb, of the *Curia*, a sort of Subaltern Court; which is correct, if under the term *Curia* we understand the whole central government in its shapeless state.

been already separately treated of in considering the development of the prerogative rights, must be here more narrowly examined in connection with one another; (1) the centralization of the administration by means of itinerant justices; (2) the institution of an official bench of justices, as a royal court; (3) the first beginnings of an estate of the realm formed by the greater barons.

I. The institution of itinerant justices was based in an almost equal degree upon the needs of the political government, and upon a concession made to the most pressing interests of the nation. The administration of the counties by the *Vicecomites* had from the first suffered from grave abuses. For this reason even under Henry I. the *Vicecomites* had begun to be relieved of certain judicial business by commissioners sent from the royal court. Reliable information on this point is given us by the oldest extant Exchequer roll, the date of which (according to Hardy's researches) may be safely assumed to be 31 Henry I. (1131). This *rotulus* declares what sums those living within the jurisdiction of the court owed as a result of the *placita* which the commissioners have held; e.g. "*Robertus filius Toli, debet XXX marcas argenti de placitis G. de Clinton.*" The total number of the commissioners who were appointed was nine, among whom are three court lords, whose names also occur in the administration of the Exchequer, and as King's counsellors: Ralph Basset, Richard Basset, and Geoffrey de Clinton. The remaining six are greater vassals of the Crown, residing in the neighbourhood of the counties for which they were associated as commissioners with one of the three first-named. The sums, which were to be paid in to the Exchequer are always only credited to the name of one of them; and it is never proved that several commissioners were engaged at one and the same time. We can accordingly deduce from these entries, that towards the end of the reign of Henry I. an innovation was introduced, in no longer assigning the Crown cases reserved (*placita regis*) by commission to the sheriffs, but in appointing a special commission to deal with them, which was in the prescribed manner so distributed among the counties, that a royal commissioner instead of the *Vicecomes* held court with the men of the county. Under Stephen, this institution, like the whole central administration, had indeed come to a standstill. But all the more pressing was the necessity which Henry II. found for appointing more vigorous commissions, since, under Stephen's reign, the sheriffs had been appointed by the two claimants to the throne from among their partisans, and the presentation of accounts and inspection of the Exchequer, had both fallen into abeyance. Now begins a much more

comprehensive system of itinerant *barones* or *justiciarii*; existing both for administrative and judicial purposes, so far as these could be separated from one another under the Norman form of government. (1)

A system of delegation was very necessary for government, and especially for financial purposes, for in the confusion of the times, the royal rights and dues had suffered from numerous usurpations. A uniform rating of the tenants for the tallages and similar impositions was difficult to compass by means of partial and corrupt sheriffs, the appeals against whom had become more and more frequent and pressing. At the same time these commissions served for a periodical scrutiny of the manner in which the *Vicecomites* discharged their office. To a still greater extent, as early as 15 Henry II., we find commissions of prelates and barons deputed with definite *articuli* for the purpose of inquiring into abuses of office committed by the sheriffs, their under-bailiffs, the manorial stewards, the foresters, and others. As delegates of the Exchequer, these commissioners are called "*barones errantes*." With these financial schemes military objects could also be combined, which partly affected the castles and their garrisons, and partly other temporary measures. After the year 1181 the more permanent business of organizing the national militia was added to their duties; and now that the old system of the Saxon national defence was again revived, its uniform enforcement could be secured by means of itinerant commissioners. These commissioners had to gather together and review the men liable to military service (*assisa de armis habendis*), and to inflict fines on those who neglected to appear.

Still more general was the need for commissioners for judicial purposes, and especially for the administration of

(1) The system of itinerant justices has no other origin but the practice of the central administration, and the decreeing right of the Sovereign, and hardly any documentary basis but the notices contained in the Exchequer accounts. Upon this is grounded the summary which Madox has compiled with great care. The later law books speak of the *justiciarii errantes*, as a customary institution, e.g. Bracton, iii. c. 11-13. A review of all the various notices is contained in the treatise of Edward Foss, "The Judges of England" (London, 1848 *seq.*), the first two volumes of which deal with this period. The author has collected from this era personal notices of no fewer than 580 justiciaries. The main

results are the following. Under Henry I. the *Magnus Rotulus*, 81 Henry I. only gives a limited application of *placita regis*. During the first eleven years of the reign of Henry II. (as under Stephen), a regular institution of the kind cannot be proved to have existed (Foss, i. 171). It was the ecclesiastical dispute with Thomas Becket which first appears to have set the great and popular reforms in motion. From 1166 down to the close of this reign, the itinerant commissioners form a regular chain, with scarcely a break (Foss, i. 174). The objects of the judicial administration come prominently forward from 12 Henry II.

criminal justice. While the land still suffered from the effects of sword law, the right reserved to the sovereign of calling up important criminal cases before him at his court, took another form. The King's peace had to be repeatedly proclaimed; and where the sheriffs lacked the power or the will to act, it had to be enforced by commissioners, who often proceeded in a summary way. From this point of view, all crimes of violence on life and limb, with rebellion, manslaughter, arson, robbery, abduction, forgery, "*et si quæ sunt similia*" were actually brought "before the royal court" (Glanvill, i. c. 2); that is, the reservation of the royal right of intervention had produced a periodical commission of criminal justices delegated from the royal court. At the same time, the Hundred's duty of presentment was re-organized, and the itinerant commissioners were entrusted with the guidance of the parochial committees formed for this purpose, according to uniform instructions, *capitula coronæ*.

Itinerant commissioners were also employed for the purposes of civil actions. The reason for this lay in the nature of the law which was to be applied. The judgments of county and manorial courts touching the inheritance of fiefs, form of dower, and the rights of the feudal lord with regard to his under-vassals, which were still considerably divergent, required to be reduced to a definite uniform system; and public policy likewise demanded the settlement of questions affecting the status of the knighthood and the freeholders (*questiones status*). From these and other reasons, an increased number of civil actions are now transferred to the court (Glanvill, i. c. 8) with the general reservation "*quodlibet placitum de libero tenemento vel feodo potest rex trahere in curiam suam, quando vult*" (c. 5). After the way had once been opened, a flood of such actions streamed towards the court, which was then opened to them only on payment of a fine. A very usual sum was five marks; we meet once with one mark for an action brought in respect of a hide of land; and then, again, a hundred marks for a suit brought for a manor; £100 for an action between the abbot and the citizens of Whitby, etc. Sometimes the King grants to persons of rank or to monasteries the privilege that they should be prosecuted at no other place but before him or his chief justice. Hand in hand with this goes the alteration made in the procedure and rules of evidence in the civil action, which has been touched upon above, according to which, in actions relating to property, and hereditary and possessory suits, the parties were allowed to choose whether the case should be determined by a committee of the lawmen

(*recognitio*), instead of by the duel. As being a deviation from the ordinary law of testimony, this needed a special writ, which was issued on payment of a fine, but at first only to "well-affected" knights and freeholders.

This system of itinerant commissioners, employed for such diverse purposes, remained for a long time in a state of fluctuation. Madox has collected the names of the commissioners of 12-13, 15-17, 20-26 Henry II., which occur in the *rotuli*. But it is difficult to obtain a clear view, as for long their appointment depended upon momentary needs. But the aims of the administration of justice become more and more definite, and financial and military ends and objects are associated with it in a more and more temporary manner. Sometimes we find commissioners who restore order in a certain place (justices of *oyer* and *terminer*); sometimes general criminal commissions (justices of gaol delivery); sometimes special justices of dower, justices of assize; and then again *justiciarii ad omnia placita*, or *justiciarii itinerantes* for general purposes (Bracton, iii. c. 11-18). At the Assize of Northampton, 22 Hen. II. (1176), the institution has attained a more definite form, by the division of the country into six circuits, which even then comprised the same counties as to-day. Criminal as well as civil actions were assigned to the commissioners; as also were the superintendence of the procedure by presentment, the guarding of the royal rights on demesnes, escheats, feudal dues, feudal wardships, etc. This arrangement, although it had been settled with the advice of a great assembly of notables, was again altered in 25 Henry II., and a new division into districts attempted. In the year 1194 new commissions were again appointed with an extended employment of juries in civil and criminal cases, and with authority to collect the tallages and crown dues. Finally, the division into six circuits has lasted down to our day; though for a long time general and special commissions, regular commissions, and those appointed *ex tempore*, continued to exist side by side. (a)

(a) A new epoch is introduced by the extraordinary Assize of Northampton, 1176; at which the counties were distributed into six circuits, and three *justiciarii* appointed for each circuit. Here evidently a new organization was intended, for which it was considered once more advisable to obtain the assent of the *meliores terræ*. Allowing for all possible expansion of the royal sovereign rights, still the institution of itinerant commissioners contained a dangerous innovation upon the *Leges Eduardi*, and the principle

of obtaining judgment by a *judicium parium*. Palgrave (i. 295) assumes (and, for the beginnings of the institution, probably rightly enough) that the itinerant justices were only commissioned to examine into the facts, whilst the judgment was reserved to the King at court. The peculiar form of Norman court justice had, however, brought about in England a submission of the parties, which found no parallel upon the Continent. A royal special commissioner now brought with him the authority of the King himself;

The immediate management by the court of such an enormous amount of business was sure to exercise an important influence upon the form of the central government. Hitherto the Exchequer had been the only permanent magisterial department with organized offices; all other national business was deliberated upon by informal "*conseils*," and partly dealt with by judicial commissions in the usual forms appointed for the purpose. In this informal manner a permanent creation arises.

II. This was the origin of a Court of King's Bench under the general name of *Curia Regis*—a second permanent official body existing side by side with, and to a great extent blended with, the Exchequer. The judicial cases reserved for the King, which had been in earlier times assigned to the Exchequer or a county court, were now as a rule dealt with by itinerant

whence an appeal to the *Curia Regis*, that is, to the supreme appointing power, was considered useless. Hence can be explained how commissioners in such early times not only acted as expounders of the law, but themselves gave judgment, and that (at all events, to judge by its results) their sentence was considered final. Even in somewhat early times the commissions of justices appointed to pronounce final judgment on crimes in the name of *Curia Regis* ran, "*ad audiendum et terminandum*." If a number of county justices were associated with these commissions, this was but a reminiscence of the old position of the witan, and soon became a formality. The same fate befel it that appeared, in later times, in the decay of the institution of *Schöffen* in Germany. But if this condition of things, which had arisen from the necessity of justice, was to become a permanent political institution, it can easily be conceived how even an absolute government deemed the assent of the Crown vassals advisable, especially in those days of church quarrels. We can perceive, nevertheless, how little the resolutions of such assemblies of notables possessed the binding force of positive rules of law. Within three years, at an assembly held at Windsor (25 Henry II.), those resolutions were considerably altered, although at this assembly only a number of prelates and Crown vassals are mentioned after the ordinary fashion of royal councils (Parry, *Parliaments*, 16). The country is now divided into four circuits, and the constitution of the commissions altered (Foss, i. 171).

In later times, we find, as a rule, at the head of the list of the itinerant justices, such ordinary *justiciarii* as are at the same time members of the bench of the King's court which had been established in the meantime. Then follow those who were mere *justices errantes*, frequently under-officials, who in later times were promoted to be regular *justiciarii*. Landowners and clergy of the county were often added to their number, especially where it was a question of collecting tallages and other impositions (Foss, i. 334, 335). Under John the circuits were interrupted for several years, especially when the king held circuit in person, in which case he was accompanied by a few *justiciarii* (Foss, ii. 27). Under Henry III., a bishop or an abbot, and one or two ordinary *justiciarii* of the "*bancum*" are generally at the head of the commission; the others are greater or lesser vassals of the Crown, or clergy of the county (Foss, ii. 191, 192). In the middle of the thirteenth century, the law-book of Bracton gives us the formula of a special writ issued for the appointment of an itinerant justice: "*Constituimus vos justitiarium nostrum, una cum dilectis et fidelibus nostris, A. B. C. ad itinerandum per comitatum W. de omnibus assensu et placitis, tam coronarum nostrarum quam aliorum, secundum quod in Brevis nostro de generali summonitione inde vobis directo plenius continetur*." The manner in which the new institution of *recognitions* and the courts of presentment were combined with the itinerant justices, has been described above.

commissioners; who might be members of the Exchequer, and also might be other prelates and barons, learned in the business of the courts, and assisted by under-officials of the Exchequer or other clerks. These commissioners found themselves on the one hand continually obliged to refer to the Exchequer, with which they remained connected on account of the fees, fines, escheats, forfeitures, tallages, and other financial and military business; and on the other hand, the itinerant justices had numerous cases to determine for which they had to frame new maxims as well as principles to determine both the procedure and the law which was to be applied. Under Henry II. there was instituted for these weighty juridical questions a sort of bench or *bancum*, consisting, it appears, at first of itinerant justices, and to a certain extent identical with the functionaries of the Exchequer. The *summus justiciarius* is the head of the Exchequer and of the *bancum*, and there existed for a long time a similar arrangement to that which still exists in England: viz. various magisterial departments composed of the same persons as functionaries. The same person can be in his capacity of itinerant justice, a justice in Eyre; as a member of the Exchequer staff, he is a baron of the Exchequer; as a member of the King's court he may be a justice *in banco*. Hence it is difficult to determine the exact year with which the formation of a bench of justices began. In any case, the authority we possess is a decree of 24 Henry II., according to which five commissioners were appointed, "who shall not journey through the land, but shall hear pleas at court." The business was so distributed that the great mass of it was discharged by the itinerant justices; but the more important cases were dealt with by the judicial bench, that is, either in the Exchequer or in the King's court *in banco*. (2)

(2) The origin of a Court of King's Bench is in like manner a creation of the administrative practice. It first appears in the administrative records, is then recognized in the law books as an existing institution, and is finally traced back to common law. The time of its origin must be accordingly determined by a kind of circumstantial evidence, to which the word *justitiarius* gives us a clue. Formerly every royal commissioner was so called, e.g. those who were entrusted with the drawing up of Domesday Book, the royal commissioners in the army, and even ship captains (*justitiiarii navis regis*). It was not until the time of Henry II. that the term received the more special meaning of a permanent *commissarius*

for judicial business. Such commissioner-justices were formerly no more frequently found than were permanent judicial commissions. The *summus justiciarius*, too, does not become an ordinary officer of the realm until the time of Henry II. As late as 1165 and 1177, Hoveden terms the justices appointed by the King, quite indefinitely "*fideles*," "*familiares*," and "*barones curie*." There certainly existed a closer circle of prelates and barons about the person of the King, who as being men learned in the law were habitually employed in the Exchequer and on commissions; but they formed no "bench," and had no permanent offices. The assizes of Clarendon, that is, the year 1164 or 1165, appear here, too, to



During the second half of the reign of Henry II. we arrive at the following definite results:—

1. A considerable number of persons form a permanent body of justices, under the title of *justiciarii*, who are so styled officially in the royal rescripts. Soon after Henry II., royal patents addressed to the "Chief Justice and his other justices of England" are met with, which formally express the official character of the ordinary justiciaries. The chancellor, too, acts as justiciary, as do occasionally also all the great officers of State, whom we find among the itinerant justices acting as heads of the commission. That the clergy, being learned in the law and in the discharge of business, are much and constantly employed, is shown by a list (Foss, i. 161), in which occur amongst the chancellors and justiciaries of the period the names of five archbishops, eight bishops, three abbots, eight archdeacons, and two royal chaplains. From the time of the first formation of the Bench onwards, its members appear as a higher class of ordinary *justiciarii*, taking precedence of those who are merely *justices itinerant*; but the latter were afterwards frequently promoted to be ordinary members of the Bench. (a)

2. That at the close of Henry II.'s reign there was a perfect system of procedure before justices *in banco* at the King's court, is shown by Glanvill's work. This procedure had attained to such a settled and scientific perfection, that an established practice of the judicial body must have for some time existed. With this King's court, the momentous reforms in the procedure of the civil action (*recognitio*) have been associated by Glanvill; and indeed they were connected by him with the same disputes touching possession, ownership, and inheritance, that were simultaneously decided in Nor-

be the turning point. With this date begin the regular lists of the itinerant justices. The necessity of issuing uniform instructions to these commissioners, and the necessity for a mutual communication of, and accounting for the legal principles to be applied, soon led to the formation of a bench, in which could be found the necessary uniformity in practice. A further clue to the date is given by the fees which are paid by suitors for license to bring their plea before the *Curia Regis*; the oldest instances of such fines are found in the Exchequer rolls, 15 Henry II. (Madox, i. 96, 429). Everything points to the period 1165-1179 as that in which the Court of King's Bench originated.

(a) The personal accounts have been

carefully collected in Foss, vols. i. and ii., but a comparatively mixed employment of the judges is still continually manifest. Thus, for instance, once under Henry II., the chancellor and the constable together hold the assizes of Kent; under Richard I. the chief justice, Archbishop Hubert, presides at the county assize, and his colleagues on the commission deal with the *placita coronæ*, disseizins, inheritance cases, etc. The royal decree of 24 Henry II., according to which five commissioners are appointed "*qui a curia non recederent*," but whose duty it is to hear pleas at court (Bened. Petr. 266, A.D. 1178), contains the origin, or at least is an evidence of the prior existence of a Bench of Judges.

mandy by committees of the *vicinetum*, committees which had already long existed there as customary *enquêtes*. (b)

8. According to an opinion formerly prevalent, a civil division for the *communia placita* separated itself from the royal court *in banco* in Richard the First's reign, so that at that early time a double judicial body is said to have existed for the hearing of cases, a *bancum regis* or royal court proper, and a *bancum commune*. The chief authority for this assumption was Coke's preface to his Eighth Report, which in making this statement contradicts Lord Bacon. The careful researches of Foss (ii. 161-179) are, however, sufficient to rebut this view. (c)

In the whole formation of the King's court *in banco*, we must not overlook an original and long enduring connection with the Exchequer; which can be explained by the fact, that the Exchequer had long existed as a magisterial department, in which the procedure of the central administration had become pre-eminently perfected; as well as by the fact that the central government still employed the same persons, in varied capacities, sometimes for financial, and sometimes for judicial purposes. This continuous connection is shown in the following points.

(b) For the procedure of Glanvill, vii. 9. sec. 7; xiii. 15. sec. 6; ii. 6. sec. 4; v. 4; Spence, Equitable Jurisdiction, i. 101, 112, 128. Since the acceptance of ordinary civil suits at court, and the allowance of a *recognitio*, are royal favours, and since in all cases reserved the ruling of the court presupposes a personal act of the sovereign, the civil action in the *curia* assumes almost the form of a Roman procedure by rescript. The plaintiff must sue out a writ for this purpose, for which he has to apply to the secretary of the King, the chancellor. In the regularly recurring cases, the writ soon became a matter of course, and was to be obtained from the clerks of the Exchequer on payment of a fee. The initiative writs now became *formulae actionum*, obtained through the interposition of the chancellor as *officina justitiæ*. Through the association of the itinerant justices with the county courts, a new *ordo judiciorum* arose; viz. commencement of the action by writ, summons by the sheriff as under-officer of the supreme court, *litis contestatio*, and replies according to the Norman rules of pleading, in certain cases empanelling of a jury (*recognitio*), which in course of practice became extended to a general employment of

a civil jury. These oldest pleadings are printed in the "*Placitorum Abbreviatio*," (1811, folio) more in detail in Palgrave, "*Rotuli Curie Regie*," vol. i. from 6 Rich. I., vol. ii. I Joh.; Lond., 1835-38. The treatise of Gundermann, "*Besitz und Eigenthum in England*" (Tübingen, 1864), gives a useful sketch of this formulary system. See also Brunner, "*Entstehung der Schwurgerichte*."

(c.) It is conclusive evidence, that the three passages in Glanvill, which speak of the *justiciarii in banco residentes* do not say a word about a double *bancum*, that other testimony upon this point is wanting, and also that a chain of circumstances speak against it. There existed, as a matter of fact, down to Magna Charta, only one court *in banco*. The proceedings before it were described by Glanvill as "*coram justiciariis in banco residentibus*." Expressions, such as "*diem habet in banco*," were from Richard I.'s time tolerably frequent; royal decrees were also issued to the "*justitii in banco*," or to the "*justitii de banco*" (Foss, ii. 171). The expression *bancum* (bench), to denote the judicial body itself, did not, however, become current until the following period.

(i.) The *summus justiciarius* was the common president of the King's court and of the Exchequer; and the Exchequer as the elder magisterial department remained so closely associated with the other, that it was not until centuries later that an appeal from the Exchequer was allowed; whilst the *bancum regis* became, immediately after its origin, the court of higher instance for the *bancum* of the *communia placita*.

(ii.) All great officers, who were *ex officio* members of the Exchequer, and had their representatives there, were accorded the same right in the newer King's court. The constable and marshal had accordingly representatives of the same name in the King's court, and in those courts which arose out of it when it became later subdivided. The same right was also conceded to those members, when the Exchequer of Jews became separated from the chief Exchequer. In like manner the office of the hereditary usher became subdivided.

(iii.) The personal privileges of the officials of the Exchequer were transferred to the *justiciarius* of the newer King's court; notably an immunity from the common amerciaments of the county and from scutages, and a privileged position in using the court tribunal for the settlement of their actions at law. These exemptions were expressly referred to the old privileges of the Exchequer, "*per libertatem sedendi ad scaccariam*."

(iv.) The offices remained to a certain extent common to both, as was also the court house. The Great Seal was as a rule kept in the treasury of the Exchequer (Foss, ii. 9). The King's court properly followed the person of the sovereign, but its usual seat, notwithstanding, was with the Exchequer in Westminster (Foss, ii. 168).

(v.) In consequence of the original connection subsisting between both departments of justice, the routine of business was discharged by clerks from the Exchequer; that is, according to its older pattern. Hence the unmistakable coincidence of the *rotuli* and records of the *Curia Regis*, with the business formularies of the Exchequer. Even after the court had in later times become separated, the fines, amerciaments, tallages, aids, and scutages, were in the old fashion still accounted for to the Exchequer, by the itinerant justices. The old principle "*recordationem curiæ regis nulli negare licet*" (Hen. I. 81, 49, sec. 4), was an original principle of every royal central administration, and did not first originate in the manner of constitution of the King's court; both before and after it was a rule for the Exchequer also, for which it is incidentally recorded under Edward I. (Madox, ii. 25).\*\*

\*\* The Exchequer as a financial body appears under Richard I. as

severed from the judicial body of the *Curia Regis*. It continues to decide

Both departments are still always regarded as an emanation of the personal government. "*In curia domini regis ipse in propria persona jura decernit*" (Dial. de Scacc., i. c. 4). The king, when it pleases him, appears himself as an itinerant judge, and presides in person *in banco*; instances of this kind, until Edward II., have been collected by Palgrave; and not unfrequently a judgment is postponed on account of the King's absence. The whole primitive form of a king's court, as we can thus perceive, is as unstable as all new creations of administrative practice. With the rise of a judicial body the grand period of the professional bureaucracy in England had arrived. From Henry the First's day an official nobility begins to be formed, by means of which certain lesser vassals and clerics attain the rank of greater barons. The clergy are still in possession of the Latin official language, but side by side with it, the Norman idiom and other technical qualifications assert themselves, in which the laity successfully compete; among the latter a class of law jurists raises itself to great importance. In spite of much jealousy an *esprit de corps* now appears to pervade the great body of ecclesiastical and lay officials, who find their common bond of union in the Chancery and Exchequer. It was the dignity of the profession, and the cultivating influence of their daily occupation of administering justice, which enabled, even under an absolute government, an honourable judicial class to be formed; just as in ancient days, the Roman empire developed an honoured juristic body from the professional administration of justice. After the establishment of a Bench

the legal questions within the financial administration, and the King still makes use of his right of allowing ordinary civil actions to be decided at his will, by the *barones soccarii*. In its principal activity, however, the Exchequer is and remains the centre of the receipts and disbursements, the court of account for the sheriffs and other accounting parties. In the Exchequer the office of sheriff continues to be farmed out. Sheriffs, escheators, and certain under-officials, take their oath of office in it. In like manner from the Exchequer proceeds the deposition of individual sheriffs, and under Henry III., even a general deposition of them all. The taking of oaths of fealty, grants of fiefdoms, compromises *ad soccartam*, now frequently occur. From the Exchequer issues also the summons of the land army, addressed to the sheriff. The administering body consists now of

the chief justice and the barons; but among these the treasurer becomes more and more prominent, until, after the disappearance of the chief justice, he becomes the proper presiding judge. Under Henry III. the office of Chancellor of the Exchequer appears to have arisen (Maunsell, 18 Henry III., cf. Thomas, "Materials," 9, 10); in any case, from this time he is more frequently mentioned. From Edward I.'s time a treasurer's lieutenant is also found. The sittings in the Exchequer are still held occasionally under the personal presidency of the King, who at other times gives his orders by writing under his private seal, or verbally, and quite informally by messenger. We shall refer again (chaps. 22, 23) in the following period, to the position of the chancellor, the chancery of the realm, and to the system of the *rotuli*.

of Judges in the *Curia Regis*, the one-sided fiscal spirit of the Exchequer found a counterpoise under more enlightened reigns. In the law book of Glanvill, which was written as early as the close of Henry the Second's reign, an unmistakable progress is manifested, not only in the subtle technicalities but also in a worthier conception of the royal vocation of administering justice. Still more clearly is this judicial spirit shown half a century later in Bracton's work, with its very liberal views of the royal duties and of the power of the laws as being superior to the arbitrary will of the King.

The old shapeless *Curia Regis* becomes now embodied, for the discharge of two chief groups of national business, in two regularly constituted official bodies, the King's Court and the Exchequer. The transactions in writing between the King and these two are conducted by his cabinet council, the chancellor and his clerks. As a member of each department, the King forms between them a department of his own; one which, as *officina justiciæ*, regulates the subjects of procedure and the actions dependent upon royal writ, both of which are assigned by writ to their respective tribunals. From the close of Richard the First's reign the chancellor keeps his own registers (*rotuli cancellariæ*) which, divided into the heads of Charter, Patent, Fine, and Close Rolls, have been printed in recent years.

Side by side with these momentous changes in the administration, are seen the first indications of certain alterations in the constitution, the importance of which cannot be overestimated.

III. Origin of the Estate of Greater Barons. In spite of the fully developed sovereign political rights, Henry II. found his position less favourable than that of the first three Norman kings. The prevailing ideas of every age are determined by the immediate past, and this had severely shaken the belief in the omnipotence of the kingly power. Stephen, as well as his female opponent, had granted a number of concessions and submitted to a number of humiliations; the title and the privileges of the royal dynasty had been for twenty years discussed in every cottage. After such events Henry II. did not find it an easy task to restore the old form of government. With the far-seeing shrewdness of his race, he contrived to find first an able bureaucracy that was subservient to him personally, in order to restore the surviving administrative organization. The mass of the Saxon population was won over by exercising sharp surveillance over the sheriffs, by protection afforded to tenants against the arbitrary imposition of tallages by the landowners,

by concessions made to the towns, by a universal extension of legal protection, and by certain restrictions on duelling. The somewhat milder enforcement of the forest laws and the feudal dues, as well as the strict regularity of the whole administration, were acceptable to all classes.

But the relation between Church and State had become the most strained of all. During the time of sword law, the privileged jurisdiction of the clergy had been expanded in a manner which was in direct opposition to the uniform system of the Anglo-Norman political government. Henry II. was no less determined to assert his sovereign supremacy, than was his ambitious primate, Thomas Becket, to enforce the new principles of the century on behalf of the supremacy of the Church. The ecclesiastical disorders now form the turning-point, at which the King found it advisable to proceed only with the express sanction of the Crown vassals. He did this, as has been explained above (Chapter XV.), simply by summoning to extraordinary court days the more distinguished prelates and barons to discuss with them important measures touching spiritual jurisdiction. The first step in this direction was, that in January, 1164, the King laid before them the sixteen Articles of Clarendon, touching the submission of the ecclesiastical body to the royal feudal and judicial control, and that he had these articles recognized, confirmed, and finally attested, by the greater barons and the bishops. Thus the innate national idea of the highest legislative power, "*consensu meliorum terræ*," awoke to a new life. As the opposition of the Archbishop still continued, the King soon after summoned not an ordinary judicial commission, but for the first time the collective body of the great prelates and barons, in order, by formal judicial sentence, to declare the primate of the realm guilty, and in "*miser cordia regis*." The idea of an administration of justice by the "King in the national assembly," is thus revived.†

† The state of ecclesiastical affairs in the half century from 1164-1214, undoubtedly prepared the beginnings of a new constitution of estates of the realm. Though the encroachments of the spiritual councils under Stephen formed no recognized precedents, yet it became involuntarily recognized that ecclesiastical affairs could not be finally ordered by the sole authority of the King; that the Church represented a political system standing on its own rights; and that the English Church formed an inseparable branch of a universal Catholic Church of which

the King of England was not the sole head. To put an end to this state of affairs, Henry II. decided to summon the extraordinary assizes at Clarendon and Northampton in 1164, to consist of the collective body of great barons of the realm, all the bishops, and the most distinguished abbots, all of whom emerged from the great mass of *tenentes*, as an united body. The name "*assize*," which is henceforward used by historians as well as by legal writers, indicates the beginning of a new conception, which is the first step towards legislative parliaments.

The unfortunate course of the ecclesiastical controversy caused extraordinary court days to be summoned more than once, at which, in addition to ecclesiastical questions, important reforms of the temporal jurisdiction were put forward for discussion, deliberation, and approval. In these the question was one of fundamental departures from the *judicium parium*, and from the Norman judicial custom of the duel; a question of principles already enforced in practice, but for which the assent of the vassals of the Crown seemed to be advisable, in order to convert decided departures from the legal usage of both nations into permanent national institutions. Seeing that it was vitally important for the King to obtain the vassals' sanction in the ecclesiastical controversy, Henry was obliged to make those measures which were essentially necessary for the times more acceptable, by requesting the assent of his Crown vassals, a step which is always popular at the first beginning of a political constitution. The King also does not disdain, as in the Anglo-Saxon period, to proclaim once again, with the advice of his Witan, the "King's peace;" this was published in the Assize of Clarendon with the addition, "*quam dominus rex Henricus consilio archiepiscoporum et episcoporum et abbatum cæterumque baronum suorum constituit*" (Palgrave, i. 257). In this direction two innovations are conspicuous, in which the national fundamental idea of the legislative power is revived.

1. In place of the informal councils, the collective body of the great prelates, the earls, and great barons were summoned; in the resolutions of the council itself, this "*consilium archiepiscoporum, episcoporum, abbatum, comitum et baronum (optimatum procerum)*" is expressly mentioned; and at Becket's condemnation, this assembly acts as a peers' court in the form of a great feudal *curia*, and no longer as a judicial commission appointed by royal supreme power.

2. To take part in the most momentous resolutions on one of these two occasions, there were also invited a number of smaller Crown vassals. To the Assize of Northampton (1176), the *milites et homines regis*, were summoned in addition to the *barones*; or, according to other accounts, also the *Viccomites* and *barones secundæ dignitatis*.††

†† The necessity of attaching the temporal vassals to the King's cause by concessions, caused Henry in those twelve critical years, to take counsel with his assemblies of notables touching other points of the temporal jurisdiction, which produced a material alteration in the customary legal system (*lex terræ*). The Assize of Clarendon (1166) on the subject of maintaining

the public peace (Palgrave, "Commonwealth," i. 257, ii. 178; "Select Charters," p. 149), recognized important institutions which had sprung up from the practice of the courts of law and of police. According to the King's ideas, these were only deliberative estates, and were certainly not intended to be prejudicial to his sovereign rights. It was believed that

In connection with these events, a distinction between *barones majores* and *minores* is first conspicuous in a solemn political act; and this distinction has until the present time continued to form the subject of lively controversy. The word "*baro*" originally denoted a man (*baron and feme, barones civitatis London, court baron, baron to the Cinque Ports*). After the Conquest it gradually usurped the place of the Anglo-Saxon title of Thane, apparently in order, like the Latin *homo*, to express the feudal dependence of the "*men*" upon the King. In comparatively early times, by *barones* were pre-eminently meant the *barones regis*; that is, the *tenentes in capite*, who from the first were divided according to the amount of their property, into greater feudatories and lesser Crown vassals. Thus property qualification becomes again connected with political institutions. *Barones majores* and *minores* had for a long period been distinguished in the feudal militia. All such as led divisions of their own, were regarded as bannerets or officers in the feudal army. On the Continent, fifty *milites*, or at least twenty-five, were reckoned to one banneret; in England, in proportion to the smaller scale of enfeoffments, a smaller number appears to have formed the unit of the *constabularia*. In the active army, the King certainly appointed the commanders, but it was inevitable that the greater vassals, who by virtue of their feudal possessions had to furnish whole *constabularia*, should regard themselves as entitled by birth to be officers (*seigneurs*) of the feudal militia.

From the first, the distinction between *barones majores* and *minores* was known in the Exchequer. Reliefs, wardships, and marriages of the great feudatories formed the principal items in the financial administration. Whilst those of the single knight's fee were fixed at a hundred shillings, those of the greater lordships were not until later times fixed at a hundred marks; and in this respect we often find a dispute, as to whether the *relevium* of a fief is to be calculated on the fief as a barony, or separately on the single fiefs.

if the magnates of the land had once declared their assent to an institution called for by the times, the matter was set at rest by the new institution having obtained a recognition of its legality. This conception the political government adhered to for a whole century. After 1176, we hear no more of assizes under Henry II., nor of any under Richard Coeur-de-Lion. It is not until 5 John that a royal decree is mentioned (Patent Rolls, 5 Joh.) which regulated the "*assize of bread*," "*communi concilio baronum nostrorum*."

It may be that it was necessary to connect the regulation of the prices of provisions (as being a measure of vital interest to the national life) with due formality with the *Assisa de pace servanda* under Henry II. It is not apparent that any general assembly was convoked at this time (25th April, 1204) (*vide* Selden, "*Titles of Honour*," 735); it appears rather that only an ordinary council was held, whose assent it was found advisable to mention at the promulgation of the measure.



In computing the *amerciements* again, the greatest *feudatories* are more highly taxed; on which account certain Crown vassals appeal against their rating as "barons," on the ground that they only possess single fiefs. A notable example of this is the case of the Abbot of Croyland (19 Edw. II.).

From the earliest times *barones majores* and *minores* were distinguished at court. Of course it was only magnates who were able to attend the gorgeous assemblies with a retinue. To them by custom an express invitation was issued, and by custom they were treated with much greater distinction than the knight without attendants.

For the same reason there had long existed in the popular mind and in the language of common life, *barones majores*, and *barones minores*.

We can easily understand from this condition of things, that contemporary writers make use of the expressions "*barones majores et minores*," in such a manner that a later age was led to conceive of the difference thus drawn as a distinction in rank, which, however, viewed by the light of the law, does not in reality exist. A difference in rank would presuppose that the great estates were held by a special tenure in a different manner from the simple knights' fees, but in the great register of the fiefs made in the time of Henry III. and Edward I., and which was printed in 1807, under the name of *Testa de Neville*, the terms *honors*, *barones*, and *feuda* are used in such confusion that a definite and legal distinction manifestly does not exist. The expert who wrote under Henry VI. his treatise upon feudal tenures (*Littleton on Tenures*), upon which the later works of Coke and Blackstone are based, knows no distinction between tenure by barony and tenure by knight's service; and this legal authority is sufficient to determine the question.\* Just as little were the

\* In the relations of private law no difference could anywhere be found between a knight's fee and a barony. All the incidental distinctions only rest upon the administrative practice; and even in the Treasury records it took a long time before the various amounts of the *relevia* led to a fixed distinction; as in the Rot. 9, Henr. III., "*Per inquisitionem, quam Rex præcepit fieri, idem Walterus tenuit de Rege in capite per feodum militis, et non per baroniam*" (Madox, i. pp. 318, 681, where we also find other instances of the use of "*baronia*" and "*honor*" for those possessions which pay the great *relevium* of a hundred marks in a round sum). The manner in which the "*Dialogue de*

*Scaccario*" (ii. cap. 10) speaks of "*baronie majores et minores*" proves that even in the practice of the Exchequer as it was in those days, there existed as yet no fixed terminology. The law book of Bracton (ii. p. 39, sec. 6) is the first to testify that in those days the tribunals began in certain particulars to distinguish between "*baronia*" and "*vasoria*"; "*quod dicitur de baronia non est observandum in vasoria, vel aliis minoribus feodis quam baronia, quia caput non habent sicut baronia.*" But this conception only dates from the middle of the thirteenth century. It was not until Henry III.'s reign, after *Magna Charta* and a multitude of other precedents, that the

greater and lesser Crown vassals distinguished by their family designations. The greatest feudatories are sometimes only denoted by a Christian name, and sometimes by a family name, with or without the prefix "de"; the same is the case with the lesser vassals of the Crown, and also with the under-vassals. In a few families (Baro Stafford, Baro de Greystock) the word "*baro*" becomes customary for well-known reasons, yet this is not peculiar to the greater vassals. These circumstances induced the Committee of the Upper House when examining into the question of the peers' dignity, to allow that an "estate of the realm" did not exist before the time of Magna Charta. The actual and social difference was still no legal one, not legal from the point of view of public law, because no *cour de baronie* existed; not legal from the point of view of private law, because greater as well as lesser *tenentes in capite* have equal rights of tenure.

Notwithstanding that the state of the kingdom had repeatedly compelled Henry II. to accord to the most conspicuous spiritual and temporal vassals a voice in legislating, yet it is clear that the King in convoking the notables had just as much freedom of action as he had in originating all the *consilia optimumum*. The summons was issued on the ground of personal confidence, and especially to such as were already honoured with important confidential offices, it was issued in accordance with the custom of the court, which had always honoured certain great vassals with a personal invitation (*writ*), and it was issued on the basis of the size of their estates, which was known in the Exchequer, and with regard to the distance at which their places of residence lay, of course paying due regard to their personal standing and the opinion of their compeers. And accordingly these conventions were not "feudal parliaments," but only great councils of notables, and for that reason they cease, and disappear for more than a generation.

As to the form and effect of such a summons, nothing was definitely settled in this period. But there were precedents extant, cases in which the King had taken the opinion of his vassals "*super arduis negotiis regni*," and had obtained their assent. If this assent was proper in the eyes of the King, it appeared still more proper in the eyes of the vassals. For resolutions of this kind the denotation "*assisa*," borrowed from the feudal *curiæ* of the Continent, is used; and even the law book of Glanvill, in dealing with material alterations made in the legal and judicial constitution, lays stress upon the question whether they had been brought about by

popular tongue began to speak of the the greater Crown vassals (Parry, "baronage" as the sum total of all "Parliaments," xi.).

an *assisa generalis* or not. The monarchy in these convocations had pursued merely temporary aims; but for the first time for many long years the great barons had again assembled in the political councils. The historians speak again of the King as "*cum principibus suis de statu regni et de pace confirmanda tractans*." The rights of the estates of the realm had once more attained a definite form, and on this account the court days of Henry II. were important precedents and of considerable moment in the events which led to Magna Charta, and also as one of the bases of the later parliamentary law.†††

††† The impediment to progress in this direction lay at this time still in the nature of the Crown vassallage itself, which, consisting as it did of hundreds of small feudal possessors, did not contain the element of a political peerage. This difficulty increased just in the times of the Crusades by reason of the numerous alienations of single knights' fees and smaller parcels of land; so much so that we now meet with *tenentes in capite* in possession of one-twentieth, one-hundredth, or one three-hundredth of a knight's fee. As it was impossible to draw a sharp line between the greater and lesser vassals, only the form of the royal summons remained wherewith to form an assembly of notables capable of legislating. If this summons was wanting, there was an end of the great court days. And thus it came to pass; the Assizes of Clarendon and Northampton were not repeated for a whole generation.—In modern times the

critical theme of *barones majores* and *minores* has been again treated of in detail by Hallam ("Middle Ages"), and with much caution in the Peers' Report (iii. 87, 97, *seq.*, 109, *seq.* 254). If in the latter we are forced to acknowledge that the summons to a *consilium regis* at this period was exclusively dependent upon an act of the sovereign, this negatives the idea of an "estate of the realm" consisting of Crown vassals, since the choice among hundreds was entirely dependent upon royal writ. The English nobility itself would be brought into difficulties by the confused idea that every vassal of the Crown in the Norman *Curia Regis* was entitled to a seat; for the claims to a seat in the present House of Peers would have been innumerable if every descendant of a possessor of three or four hides, who at one time or other had belonged to the *tenentes in capite*, could lay claim to baronage by tenure.

## CHAPTER XVIII.

*Magna Charta.*

AFTER the rule of Henry II., which was energetic, though in its latter years full of vicissitudes, comes Richard Cœur-de-Lion, adventurous and aimless, but a faithful reflex of the times in which he lived, and accordingly popular. The regency, appointed for the time of his crusade, soon came into conflict with the great barons and with the King's brother John. During the absence of the King, England again saw one party of the barons in feud with another discontented faction. With his return from captivity the personal rule of the King is restored, and he now holds a court day (*colloquium*) after the old fashion, sits in judgment upon his brother John and upon a bishop, imposes a hide-tax of two shillings upon every hide of land; but, engaged in unceasing feuds upon the Continent, loses his life at a siege. The absence of this knight-errant from English soil, which was, with the exception of a few months, continuous, proved extremely beneficial, in so far as it rendered the continuance of an organized internal government possible.

The reign of John which followed appears again to unite in itself the worst qualities of the Norman system. This King, who had already proved a faithless son and treacherous brother, forfeited by the murder of his nephew Arthur his French fiefs, and thus brought about the separation of Normandy from England. He involved himself in a struggle with the papacy, and concluded it by a humiliating submission. In his government of the realm he was still more aimless than Richard, harsher and more avaricious than any of his predecessors; he estranged all classes of the people successively by cowardice and cruelty, by greed and arbitrariness. At length he brought about a crisis in which all elements of opposition against absolutism leagued themselves together and took action in common.

First and foremost among these opposing forces stood the Church, which even under Henry II. had asserted itself as a power equal with the monarchy. The time had arrived when Innocent III., in the zenith of his might, at the Lateran

Council (1215) proclaimed the Church as the universal monarchy. In his rupture with this power John brought matters to such a pass, that the Bull of excommunication was proclaimed to his face, and his deposition from royal dignity, and the absolution of his subjects from their oath of allegiance were published upon English soil.

But among the temporal vassals also much had been changed since the Conquest. Since the Crusades the consciousness of the dignity of the military profession had mightily increased. The strength of the heavy-armed warriors had for generations decided every conflict; all the power of princes now primarily depended upon the number of such warriors. The equal balance of conditions throughout the whole of Christendom, and the sanction of the Church, had created an *esprit de corps*, which under the walls of Jerusalem had formed for itself an universal code of honour, which even princes could not refuse to acknowledge, and which found in tournaments and social customs further support and expression. Whilst therefore the barony and knighthood began to feel themselves a unity, they were bitterly aggrieved by the arbitrary imposition of scutages and income taxes; and now, too, when in the Exchequer and in the government of the country bailiffs the prosaic system of amerciaments and fines had reached its climax, John, as the guardian of orphans, dealt with his feudal wards with unheard-of injustice, and regarded the wives and daughters of his greater vassals as objects for his licentious desires.

In the towns of England also, as well as amongst the freeholders, much had in the course of time been altered. The extension of the feudal law, with its rigid rules of inalienability and primogeniture, to the whole landed property, had in its very excess become an unnatural system, in opposition to which the natural laws of political economy and family life tacitly asserted their rights. By the circuitous path of royal licence on payment of a fine the alienation and partition of feudal estates had to a considerable extent been resumed. Marriage and decease, inheritance by daughters in equal shares, escheat and regrant in smaller divisions, subinfeudation, and even direct selling in parcels (which was done by the vassals on embarking for crusades, and was favoured by the Crown) had brought about new estates of freehold in land. Mercantile and commercial business, promoted by the crusades, which had exercised a most beneficial influence upon the cities and boroughs, had, after the time of Richard I., raised a considerable number of English towns to a high degree of independence. This class also, in spite of its innate

loyalty, was in a humour to make common cause with the spiritual and temporal Crown vassals against despotism.\*

But it was, above all, the blending of the Franco-Norman and the Anglo-Saxon nationalities, by this time complete, which had imperceptibly undermined the foundations of absolutism. For five generations they had now lived together under one Church, one kingdom, one administrative system, enjoying peace in common, and suffering equal oppression. The period of sword law under Stephen, and still more the ecclesiastical controversy with Thomas Becket, had at times elevated other antagonism above the national dissension. Parochial and family life had made intermarriage between the Angli and Francigenæ a daily occurrence. Under the strong political and ecclesiastical power a new insular national culture became matured, which through the separation of Normandy from England developed its own characteristics. In this new creation the Saxon element predominated, not merely in numbers, but in those peculiar attributes of character which the Anglo-Saxons retained unchanged in their family life, their manners, and their language. The sober, moral earnestness of this family life, in contact with the brilliant and volatile nature of the Franks, proved the stronger of the

\* The events of the origin of Magna Charta have been portrayed by historians with justifiable predilection. (Cf. Leppenberg-Pauli, iii. 293-487.) For the purpose of this description it is important to consider the relationship between the powers who league together in the act of June 15th, 1215, against the monarchy; and the shifting of which in the following half-century brought about such a marvellous change in their positions. The counterforce of the Church was at this time the most imposing as well as the most stable. Archbishop Stephen Langton himself, in spite of his promotion by the Pope, strongly impressed by the popular feeling, not only undertook for a time the conduct of the movement, but remained staunch to the right cause, and may with justice be considered a patriot. But immediately after success had been gained, the imperious behaviour of the Curia towards the barons reminded the nation only too sensibly that a spiritual absolutism existed side by side with the temporal. Among the Crown vassals of this period the majority had only risen to importance under Henry II., and owed their influential position to the newer system of political administration. At the head of the armed

opposition stood pre-eminently the northern barons. In the framing of Magna Charta, the school of the official nobility formed under Henry II. is recognizable. All parties of the then existing nobility apparently took very slight interest in the possession of Normandy; for the re-conquest of which no efforts ever appear to have been made. The powers of resistance displayed by the Crown vassals certainly seem to have been strengthened by the spirit of knighthood, and by the sympathies of the under-vassals and freeholders. But custom knew no other than a royal authority in the feudal militia, and that body easily became disorganized under a marshal of their own choosing. The scattered position of the military fiefs, and above all the want of financial means, rendered a lasting resistance impracticable. Hence can be explained why the barons, after a few months' struggle, were no match for the financial power of the King, with his paid soldiery and garrison troops. The increasing importance of the freeholders and cities has been already adequately estimated by Spelman "on Parliaments" (cf. Peers' Report, i. pp. 32, 35, and below, cap. xix.).

two elements; and finally in Church and State, in the community, and in the family, assimilated to itself the Frankish character until, in spite of a continuing difference in language and in class ideas, it became once more predominant in the nation. The greater portion of the powerful classes in the country were indeed still by name and descent Francigenæ; but with each successive generation, the population of the British Isles became more and more consolidated into the form of a nation Germanic in character.\*\*

It is these elements that are comprehended in the world-renowned events of the 15th June, 1215, which, under the

\*\* The most significant new basis is doubtless the reconciliation of the national antipathies, to which the often quoted testimony of the "Dialogus de Scaccario" refers: "*Jam cohabitantes Angliis et Normannis et alterutrum uxoribus ducentibus vel nubentibus, sic permixtae sunt nationes, ut vix discerni possit hodie, quis Anglus quis Normannus sit generis.*" Although in former times the national contrast of the Franco-Norman and English nationalities was perhaps overrated, yet the recent researches of Freeman (vol. v. Appendix W) perhaps, on the other hand, go too far in weakening and underrating the national contrast.

"What Englishmen suffered from was mainly that irregular often undesigned oppression, which must take place when the laws of a conquered people are administered by their conquerors" (Freeman, iv. p. 14). "The success of William's invasion was a distinct triumph of one language, one mode of warfare, of one social and political system over another" (Freeman, iv. p. 17). The point of view insisted upon by Stubbs is correct, that the Norman monarchy, with laudable consistency, upheld the legal equality of the two nations, and that the pressure of the Norman nationality was principally owing to the Normans having taken possession of the high offices in the State and the great landed properties. The national contrast is crossed by this social one, but the national antipathies in consequence were rather embittered than mollified. A deeply rooted national dissension is proved not only by credible historical evidence, but above all by the uniform bearing of the Anglo-Saxon population at every attempt at insurrection by Norman great vassals; it is evidenced also by the decomposition of the constitution of the counties, which was every-

where visible, owing to internal dissensions, that could only be rooted in the national element. Absolutism was founded on these dissensions alone, and that it had taken root there is shown by the stability of the tendency to freedom from the moment of the blending of nationalities. In spite of all changes which the positions of power and party underwent in the following generations, this progress remained irrevocable; it consolidated itself in each successive generation, and triumphantly led the emancipation of the estates to further victories, up to the close of the Middle Ages. But in this blending the Germanic element had become the preponderating one, just as Magna Charta did not arise from the Franco-Norman, but from this national spirit. It was finally the toughness of the Saxon nationality which saved England's freedom. Whilst on the Continent Romans and Romanized Celts crowded to the courts of the magnates, the Saxon Thanes and peasants remained apart during these hard times, and shut themselves within their fortified farm-houses. Whilst the adaptive Scandinavian Normans in their settlements in Normandy had, after a few generations, come to use the language of their wives, and had become Frankish in manners and customs, in England the Norman element which had become French had not, in spite of the position of the ruling class which it had held for centuries, been able to introduce one-tenth of its foreign words into the English tongue as it is spoken to-day, or more than three words into the English Lord's Prayer (Hicks, *Thesaur.*, Pref., p. vi.). Finally, it was the qualities in character which decided the issue in the question of nationality.

name of "Magna Charta," are rightly regarded as completing the foundation of the English constitution. From the moment when John in his ecclesiastical dispute had collected together the whole military array of his realm to oppose the King of France, the consciousness of their relation to this monarchy awoke in the breasts of the people. The papal legate had laid before the King proofs of the understanding subsisting between the barons and King Philip, and had thus in the first instance procured the humiliating submission of John to the papal throne, which threw the country into greater agitation than the interdict. At the meeting of the magnates in St. Paul's on the 25th August, 1213, a confederacy was formed, which, supported by a great proportion of the prelates, advanced slowly in its claims against the Crown. It was not until towards Easter, 1215, that an army collected at Stamford, consisting of two thousand knights, with a numerous following on horse and on foot, amongst whom were some great feudatories, but especially younger sons of the first families in the land. They chose Robert Fitzwalter as Marshal of the "army of God and of the Holy Church," obtained release from their oath of fealty from the canons of Durham on the 5th of May, but only succeeded in gaining a firm footing against the King and his garrison troops when, in league with the citizens of London, they had won that great fortified place. In this crisis negotiations for peace are made upon the meadows of Runnymede (15th to 19th June, 1215), in which the King, with his small retinue upon the one side, and the rebellious barons in full martial array upon the other, treat together, the Earl of Pembroke acting as mediator. The barons (perhaps Archbishop Langton himself) had originally drawn up in formal articles the grievances of the country, articles which, revised and completed, were recognized by the King by the affixing of his great seal, and being then formally issued, were raised to a royal charter.\*\*\*

\*\*\* The authentic versions of and legal treatises upon Magna Charta have not been prepared with quite that care which would have been expected from the importance of the subject. Jurisprudence, which is always slow in dealing with political questions, paid for a long time but little attention to the charter. The law books of Bracton, Britton, and Fleta scarcely touch upon it incidentally; its practical judicial effect demanded a previous specialization through the long series of Acts of Parliament which have proceeded from its fundamental

principles. It was not until after the days of the Stuarts that the science of jurisprudence did justice to Magna Charta, more especially in the restoration of the authentic text. The original document has been described by Blackstone ("The Great Charter," pp. xv., xvi). It is preserved in the British Museum (cf. Lappenberg-Pauli, iii. 424). Of the copies which were circulated by the barons only two have been found by the Record Commission, at Lincoln and at Salisbury; the first is taken for the text in Rymer, i. 131, and in the "Statutes of



Magna Charta leads us back to the details of the Norman administrative law, so that the sketch I have hitherto given will also serve as a commentary to it. To begin with, however, the relations subsisting with the Church must be especially remarked. Only in close alliance with the English prelates were the barons able to wage war against the monarchy. The charter granted in former days touching the freedom of ecclesiastical elections (p. 240) was accordingly confirmed, and was to be faithfully adhered to. The "separation" of Church and State was still popular, as being opposed to absolutism; and neither the baronial class nor the English population thought of interfering with the position the Church had now attained. The articles of Magna Charta accordingly only lay down legal limitations of the secular authority as to which the order in which we have hitherto considered them appears applicable and convenient.

I. The first group of articles deals with the legal limitations of the feudal military power, principally viewed from the financial side; touching wardship, marriage, and the amount of reliefs and aids. Herein the ancient right of the Crown was recognized, but an unfair interpretation of it for fiscal purposes, and excessive claims, were prevented by a reduction to fixed payments. The *relevium* of the estate of a *comes* was fixed at £100 in silver, that of a Crown vassal at 100 marks in silver, and that of the single knight's fee at 100 shillings (Art. 2). The feudal guardian of minors is to have his proper

the Realm," i. 7 (Lappenberg-Pauli, iii. 436). Of the treatises three may perhaps be particularly mentioned:—

(i.) Blackstone, "The Great Charter" (Oxford, 1759 fol.), in which the course of the editions and the confirmations until the end of Edward I.'s reign are described with critical care. Then follows the reprint of the thirty-nine articles, upon which Magna Charta was based (pp. 1-9); then the correct text of the charter drawn up in sixty-three articles, 15th June, 1215 (pp. 10-24). To these are added the more important later versions, especially Magna Charta, A.D. 1217, 9 Henry III.

(ii.) A legal commentary is given by Coke (Inst., ii. pp. 1-78) on the articles of the charter as contained in the version of 9 Henry III. Some serviceable additions are contained in Barrington's "Observations on the more Ancient Statutes, from Magna Charta to 21 James I." (5th edition, 1796).

(iii.) An excellent reprint, now

readily accessible, is given by Stubbs in his "Select Charters," consisting of the draft made by the barons (p. 289), the first version (p. 296), and the later alterations in the text under Henry III. (pp. 339, 344, 353, 365, 377).

In the ordinary editions of the "English Parliamentary Statutes," Magna Charta is only given in its later form (9 Henry III.). The official edition of the "Statutes of the Realm," which was issued by the Record Commission, gives the original documents; the most important of them with the addition of a *fac-simile*. The arrangement which is appended follows the development of the Sovereign rights, but in detail the sequence of the articles. An arrangement of the articles according to ranks and classes for which they were framed is given by David Rowland ("Manual of the English Constitution," London, 1859, pp. 50-60).

income and ~~services~~; he is not to lay waste the lands, but rather to keep them in condition (5, 6). Feudal heirs are to be married suitably to their rank (7). The widow is to have her dower, and must not be compelled to marry again (8, 9). Arts. 12 and 14 (dealt with below, V.) relate to the imposition of *scutagia* and *auxilia*. No mesne lord is to be allowed the right of taking other *auxilia* from his under-vassals than a proper aid in the three ancient customary cases (15). No one shall be constrained by distraint to do more services for a knight's fee or another free fee than he was bound to do formerly (16). No governor of a castle shall compel a knight to pay money for the castle guard, if he performs it in his own person, etc. (29). Moreover, all these regulations are to be recognized by the feudal lords as binding on them with regard to their men (Art. 60); "*Omnes autem istas consuetudines predictas et libertates, quas nos concessimus in regno nostro tenendas, quantum ad nos pertinet erga nostros, omnes de regno nostro tam clerici quam laici observent quantum ad se pertinet erga suos.*" A great portion of these feudal articles is in accordance with the old promises of the charter of Henry I., but differs from the latter in its much more determinate framing, and providing for the sub-vassals, and for proper execution. (1)

II. Legal limitations of the judicial power. (i.) Concerning *civil justice*: the hearing of ordinary civil actions shall no longer follow the royal court, but shall be held in some certain place (Art. 17). The civil assizes shall be held once a year in every county by itinerant justices (18, 19). None are to be appointed *justiciarii*, county and local justices, who are not versed in the law of the country, and willing to duly observe the same (45). The arbitrary and disproportionate fees exacted for judicial proceedings are to cease: "*nulli vendemus, nulli negabimus aut differemus rectum vel justitiam*" (40); and as a fact, from that time the great fines derived from actions, and the sums paid for stay of judgment disappear from the Exchequer accounts. (ii.) Concerning *criminal justice*: no *Viccomes*, no constable of a castle, or local bailiff of the King, shall from this time forward exercise in his own right criminal jurisdiction and decide *placita coronæ*

(1) Legal limitations of the feudal military power are especially contained in the articles 2-8, 12, 14, 15, 16, 26, 29, 43, 60; "*Nullum scutagium vel auxilium ponatur in regno nostro, nisi per commune consilium regni nostri, nisi ad corpus nostrum redimendum et primogenitum filium nostrum militem faciendum et ad filiam nostrum primo-*

*genitam semel maritandam, et ad hoc non fiat nisi rationabile auxilium*" (12); summons of all Crown vassals to the *commune consilium* in such cases (14, below, note 5). All these *libertates* were also to be observed by the feudal lords towards their sub-vassals (60).

(24); it is manifest again from this how popular the centralization of justice at the expense of the county and town bailiffs had become.

But the most essential clause, which also relates to legal procedure, is the fundamental article 39: "*Nullus liber homo capiatur, vel imprisonetur aut dissaisiatur aut utlagetur aut exuletur aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terræ.*" This is the assurance of the continuance of the *Leges Eduardi*, of the traditional judicial constitution with its legal protection accorded to person and property. By "*iudicium parium*" is meant, not such a jury as in the year 1215 existed only in civil procedure, in the elements of a *jurata*, but *judgment by peers*. The addition of "*vel per legem terræ*" runs in one copy "*et per legem terræ*" ("*vel*" in the language of this time often occurring for "*et*"); accordingly, this clause deals with the frequently repeated assurance of the traditional law of the land and judicial procedure; but the assurance is more strictly framed, and demanded in its present shape by the Norman magnates themselves, and accordingly guaranteed again by them to the *liberi homines* of the realm. (2)

III. *Legal limitations of the police power.* The main point lay in the system of amerciaments; for by the imposition of police fines every judicial protection of person and property could be rendered illusory. Magna Charta (20), directs the following provisions against such abuses: (i.) The police fines shall correspond in amount to the magnitude of the offence: "*Liber homo non amercietur pro parvo delicto nisi secundum modum delicti, et pro magno delicto amercietur secundum magnitudinem delicti.*" (ii.) The execution in respect of police fines is to take place with the *beneficium competentiæ*, in such a manner that every *liber homo* should save his necessary

(2) *Legal limitations of the judicial power* are comprised in the clauses 17-19, 24, 34, 38-40, 45, 54, as follows:—"*Communia placita non sequantur curiam nostram sed teneantur in aliquo certo loco*" (17); "*nullus Vicecomes, constabularius, coronatores vel alii ballivi nostri teneant placita coronæ nostræ*" (24); "*nihil detur vel capiatur de cetero pro brevi inquisitionis de villa vel membris, sed gratis concedatur et non negetur*" (36). "*Nullus liber homo capiatur vel imprisonetur,*" etc. (39 v. above). This essential clause had, moreover, a precedent; for already during the conflict between the regency appointed by Richard I. and the barons, a similar assurance had been mutually

agreed on as to the proper course of justice: "*Sed et concessum est, quod episcopi, et abbates, comites et barones, vasasores et libere tenentes non ad voluntatem justiciariorum vel ministrorum Domini Regis, de terris et catallis suis dissaisientur, sed iudicio curiæ Domini Regis secundum legitimas consuetudines et assisas tractabuntur vel per mandatum Domini Regis.*" "*Nulli vendemus, nulli negabimus aut differemus rectum aut justitiam*" (40). Article 42 provides that the county court shall be held every month, the sheriff's tourn twice a year; the yearly sittings of the itinerant justices are to be reduced from four to one.

subsistence (*contenementum*), the merchant his merchandise (*marcandisa*), and the villein his implements of husbandry (*waignagium*). (iii.) For the condemnation of any to an amerciamment, a co-operation of the "good men" of the neighbourhood shall be necessary; that is to say, a summary judicial proceeding: "*et nulla predictarum misericordiarum ponatur, nisi per sacramentum proborum hominum de visneto.*" This comparatively immaterial and often disregarded provision cuts at the root of an arbitrary police power, and of such regulations as are contrary to the constitution; and in the course of the period in which the estates of the realm were formed, was thoroughly carried out by the co-operation of parliament. A writ, "*de moderata misericordia*," carried out in principle the appeal to legal process against police fines and administrative executions even in the local courts. A fundamental rule of liberty to move from place to place, to which the clergy also could appeal in their intercourse with Rome, is contained in article 42: "*Liceat unicuique de cætero exire de regno nostro et redire salvo et secure per terram et per aquam, salva fide nostra, nisi tempore guerræ per aliquod breve tempus propter communem utilitatem regni, exceptis imprisonatis et utlagatis secundum legem regni, et genti de terra contra nos guerrina et mercatoribus, de quibus fiat sicut predictum est.*" (8)

IV. Legal limitations of the financial power are already comprised in the provisions touching the feudal power. Whilst those, however, are only in favour of the upper classes, a number of the hardships inflicted by the fiscal Government upon the freeholders and cities are next dealt with. As to the *auxilia* (properly *tallagia*) of the city of London, the same rule is to be applied as in the case of the aids of the feudal vassals (12). London, and all other cities, burghs, *villæ et portus*, are to have their "*libertates et liberas consuetudines*" (13); merchants their trade and traffic secure, and free from all arbitrary impositions and tolls (41). There shall be

(3) *Legal limitations of the police power* are contained in articles 20-22, 24, 32, 39, 42, 54, 56, primarily concerning the system of police fines: "*liber homo non amercietur pro parvo delicto nisi secundum modum delicti*," etc. (Art. 20, *vide* above). In the case of Crown vassals the following was added: "*Comites et barones non amercientur nisi per pares suos, et non nisi secundum modum delicti*" (Art. 21). For the clergy cf. Art. 22, "*Nos non tenebimus terras illorum, qui convicti fuerint de felonía, nisi per unum annum et unum diem, et tunc reddantur terræ dominis feodorum*" (Art. 32). The rendering of illegal police fines null and void:

"*omnia amerciamenta facta injuste et contra legem terræ omnino condonentur, vel fiat inde per iudicium XXV baronum.*" etc. (55, 56). The carrying out of these principles was primarily the duty of the Exchequer and the King's court, as the courts of higher instance of the sheriff's tourn and the rest of the royal courts of record. For the manorial courts and other courts "not of record," in which the old customs still prevailed, in later times a special writ "*de moderata misericordia*" was framed, which enforced the uniform application of the principle. (Cf. Scriven on Copyhold, li. 852, 853.)

one weight and measure for the whole country (35). No city and no freeholder shall be compelled to build dykes and bridges, except where such is a matter of ancient custom (28). Purveyance and compulsory carriage are only to be enforced against the freeholder in return for immediate payment, or only with the free consent of the owner (28, 30). Neither the King nor any royal officer or other person shall take the wood of any one for the royal castles or for other uses, except with the permission of the owner (31). Those living outside the forests shall not be summoned before the forest courts (44). The newly made forests shall be disforested (47). All abuses concerning forests, warrens, foresters, sheriffs, and their officials, shall be inquired into in every county upon oath by twelve knights of the shire, chosen by the "good men" of the same county (48). Common to both feudal vassals and *liberi homines* is also the assurance relative to the regulation of inheritances of personalty, and payment of debts, especially with regard to the *privilegia fisci* (26, 27). The articles concerning the treatment of the *debita judæorum* (10, 11) are derived from the province of administration of the Exchequer of Jews. On this side is apparent the considerate regard paid to the lower classes of the people, which may probably be attributed to the spiritual advisers. The liberties granted to the Crown vassals are extended, as a matter of course, to the relations of the private feudal lords *erga suos*. The limitations imposed upon taxations are extended at all events to the city of London. Conversely, the redress of the common grievances of the country, which principally proceed from fiscal oppression, in the first instance benefits the middle classes, but reaches upwards to the higher classes also. Military vassals and *liberi tenentes* stand side by side in such articles. Many clauses refer to all the *liberi homines*, without regard to the kind of property, and are so far beneficial to the villein tenants as well. A few clauses are directly framed in favour of the villein. (4)

(4) *Legal limitations of the financial power* are comprised in articles 9-11, 16, 25-33, 35, 37, 41, 43, 44, 48, 60, especially as to the more forbearing prosecution of fiscal claims (9), debts of Jews (10, 11), the restriction of the *auxilia* to the three old cases: "*Simili modo fiat de auxiliis de civitate London*" (12); "*et civitas London habeat omnes antiquas libertates et liberas consuetudines suas, tam per terras quam per aquas. Præterea omnes alie civitates et burghi et villæ et portus habeant omnes libertates et liberas con-*

*suetudines suas*" (13). Here can be clearly seen the influence of the city of London, which was allied with the barons, and which carried the subsequent clauses relating to trade, weights and measures, as well as a special clause against the weirs made in the Thames. "*Nullus distingatur ad faciendum majus servitium de feodo militis nec de alio libero tenemento, quam inde debetur*" (16). "*Omnes comitatus et hundredi, threthingii et wapentachii sint ad antiquas firmas absque nullo incremento, exceptis domi-*

V. The legal sanction of all these liberties and assurances is connected with a number of temporary provisions. But at the same time this sanction unites with other articles in forming the first foundation of a constitution by estates of the realm. The form which had been hitherto observed in the charters could not satisfy the barons, as the question of their irrevocability had not been settled in judicial practice. Hence they adopted the course of giving the charter, by means of a solemn oath, the character of a treaty of peace according to feudal custom: "*Juratum est autem tam et parte nostra, quam ex parte baronum, quod hæc omnia supradicta bonâ fide et sine malo ingenio servabuntur.*"

The charter thus received the character of a joint compact. But seeing that any oath taken by John was worthless, and could be remitted by the Pope, and that all the limitations of the Government which had been assured, were, as against the sovereign *curia* and the Exchequer, comparatively useless, the appointment of a national committee with recognized rights of resistance was added thereto, which, combined with certain previous articles, formed the parliamentary clauses of Magna Charta.(5)

(i.) The committee of resistance was appointed in article 61 with the following provisions. Twenty-five barons (among them the mayor of London) who should fill all vacancies in their number as they occurred by co-optation, are to be elected as conservators of the charter, and are to pass resolutions according to majorities; and if the King breaks any article, four out of their number shall, on each such occasion, move before the King or chief justice that redress be made; and in case of refusal they may summon the *communa* (probably the whole of the vassals), and take from them the oath of obedience, "*et illi viginti quinque barones cum communa totius*

*nicis maneritis nostri*" (25). "*Una mensura vini sit per totum regnum nostrum et una mensura cerevisie et una mensura bladi,*" etc. (35); touching the regulation of guardianships of the "*tenentes per feodifirmam, per socagium, per burgagium, per parvam serjantariam*" (37); "*omnes mercatores habeant saluum et securum exire ab Anglia et venire in Anglia, morari et ire per Angliam tam per terram, quam per aquam, ad emendum et vendendum sine omnibus malis tollis per antiquas et rectas consuetudines,*" etc. (41); a milder administration of the royal forest laws (44, 47, 48). The latter articles form the main contents of the later separate *charta de foresta*.

(5) The temporary provisions of

Magna Charta begin with Art. 49-52, and then 55-59, 61, 62. They deal with the restoration of the *obseides*, the removal of persons named from the royal prisons, the discharge of the foreign mercenaries, the restitution of lands seized *sine legali judicio parium*, the remission of illegal fines and amercedments, the restoration of the lands in Wales, which had been torn from their possessors, the relations of England to King Alexander of Scotland, and a general amnesty: "*omnes malas voluntates, indignationes et rancores remissimus, omnes transgressiones factas occasione ejusdem discordie a Pascha a regni nostri xvi. usque ad pacem reformatam.*"

*terræ distringent et gravabunt nos modis omnibus quibus poterunt, scilicet per captionem castrorum terrarum possessionum et aliis modis quibus poterunt donec fuerit emendatum secundum arbitrium eorum, salva persona nostra et reginæ nostræ et liberorum nostrorum, et cum fuerit emendatum intendent nobis sicut prius fecerunt."*

This clause is so far in harmony with the spirit of the feudal state of the Middle Ages, as it was based upon a mutual relation of feudal protection and fealty, that is, upon compact. The vassals thus give expression to the fundamental notion of their relation as it existed in Normandy and France, yet with certain important alterations. Whilst on the Continent the individual vassal regarded himself as judge of the question as to whether or no the lord had broken his obligation to protect him, and frequently for a trifling cause sent in his letter of challenge, here in England the nobility act as a corporate body. Only in their collective capacity, represented by definite organs, are the barons declared entitled to resist, but the feud of the individual against the monarch is in no wise sanctioned. As a fact, there is contained in this harsh article nothing more than a recognition of the feudal right of distress, which belongs to the King by virtue of the constitution, and which is conceded in return to the collective body of Crown vassals as against the King. The concession by agreement of the rights of distress was altogether so entirely consonant with the legal conceptions of the Middle Ages, that in this way the committee of resistance loses a portion of its apparently revolutionary character. (a)

(ii.) The second clause respecting the estates of the realm was intended to ensure a regular summons and right of assent of all the Crown vassals in two particular cases. Thus when-

(a) The clause relating to the committee of resistance runs in the language of Art. 61 as follows:—"et si nos excoessum non emendaverimus, intra tempus quadraginta dierum, predicti quattuor barones referant causam illam ad residues de illis viginti quinque baronibus, et illi viginti quinque barones cum communa totius terræ distringent et gravabunt nos modis omnibus, quibus poterunt, scilicet per captionem castrorum, terrarum, possessionum et aliis modis, quibus poterunt, donec fuerit emendatum secundum arbitrium eorum, salva persona nostra et reginæ nostræ et liberorum nostrorum, et cum fuerit emendatum, intendent nobis sicut prius fecerunt. Et quicumque voluerit de terra, juret, quod ad predicta omnia exequenda parebit mandatis predictorem viginti

quinque baronum, et quod gravabit nos pro posse suo cum ipsis; et nos publice et libere damus licentiam jurandi cuilibet, qui jurare voluerit, et nulli unquam jurare prohibebimus. Omnes autem illos de terra qui per se et sponte sua noluerint jurare viginti quinque baronibus de distringendo et gravando nos cum eis, faciemus jurare eisdem de mandato nostro, sicut predictum est." English jurists and historians are accustomed to make very inappropriate comparisons between this article, and the insolent resistance-clauses of the feudal lords of the Continent, the Constitution of Arragon, and the like, whereas article 61 of Magna Charta is both in form and spirit very different in character to the indecent violence of the continental vassals.

ever an aid (*auxilium*) was demanded in addition to the three traditional cases of "honour and necessity," this is only to be done "*per commune consilium regni nostri*" (12); and this is to apply also to the *auxilia* of the city of London. In all cases, however, a *commune consilium* was to be convoked, whenever scutages were demanded instead of the feudal military services. To that *commune consilium* the barons were to be summoned in the following manner (Art. 14):—

"*Et ad habendum commune consilium regni de auxilio assidendo, aliter quam in tribus casibus predictis, vel de scutagio assidendo, summoneri faciemus archiepiscopos, episcopos, abbates, comites, et majores barones sigillatim per litteras nostras. Et præterea faciemus summoneri in generali per ricecomites et ballivos nostros omnes illos, qui de nobis tenent in capite, ad certum diem, scilicet ad terminum quadriginta dierum ad minus, et ad certum locum, et in omnibus literis illius summonitionis causam summonitionis exprimemus: et sic facta summonitione negotium ad diem assignatum procedat secundum consilium illorum, qui præsentés fuerint, quamvis non omnes summoniti venerint.*"

The English barons in arms, allied with the Church and the city of London, and with the consent of the country never laid claim to more than this, even when at the height of their success. They claimed no right of assent to the issuing of royal ordinances, no right of summoning a *cour de baronie*, no conventions assembled to deal with the grievances of the nation or generally with the voting of taxes; but only a right of assenting to two positive alterations in the legal conditions of feudal tenure. (b)

The possible germ of a special peers' jurisdiction was contained finally in—

(b) The clause concerning the summoning of the *magnum consilium* for extraordinary *auxilia*, and for the purpose of fixing the scutages, has, like other passages, been much distorted by political parties. This article is only directed against the arbitrary taxation of John, against the raising of the hide-tax from two to three shillings at the commencement of his reign, against the raising of the scutage from £1 to two marks, and against the continued exaction of it without any occasion for a campaign, and above all against the raising of an impost upon the personal property of the Crown vassal (1203), in direct opposition to the feudal compacts and the most solemn assurances of his predecessors on the throne. Only in those cases which contain a positive alteration in the legal con-

ditions of feudal tenure is a right of assenting claimed. Not a word is said of assenting to the promulgation of royal ordinances or laws; not a word about a right to summon a *cour de baronie* for the exercise of a jurisdiction over the Crown vassals; not a word about an ancient national assembly for dealing with the national grievances, or for the voting of taxes. As every investigation in detail destroys the favourite tradition of a "feudal parliament in arms," of a permanent feudal *curia*, and of an estate of the realm formed by "the proud barons of the twelfth century," so are these circumstances connected with Magna Charta fatal to the general conception of the *Curia Regis* which antiquaries have imagined



(iii.) The clause dealing with amerciaments (21): "*comites et barones non amercientur, nisi per pares suos et non nisi secundum modum delicti*," the phraseology of which reminds us of the peers' court which arose in later times. Since a legal distinction between the greater and lesser vassals had not as yet been drawn, there was actually contained in this clause nothing more than a general promise of the traditional administration of justice, nothing more than the "*judicium parium*" which in Art. 39 had been assured to all free men of the realm. (c)

Magna Charta accordingly contains much less of formal constitutional law than has been looked for in it. But it contains the leading traits of the English character and constitutional system. The Norman magnates had now been compelled to make their choice between the island and the Continent. In England they could not shelter themselves against the monarchy behind the walls of their castles, but were obliged, as individual resistance was impossible, to break through arbitrary power in a collective body, making common cause with the clergy, and backed up by the sympathies of the people, and to win for themselves and the people common rights and guarantees against such despotism, and thus base the constitution primarily upon personal liberty, and upon a uniform legal protection accorded to person and property. This nobility, which had for generations been the first to bear the oppression of the absolute monarchy, and the burdens of the state, had learned to sympathize with the people's wrongs, and thus began to realize its vocation of placing itself at the head of the nation in the new constitution that was being formed; in this sense Magna Charta was also a pledge of the reconciliation of the classes. Its origin and its confirmations kept alive for centuries the feeling of the community of certain fundamental rights for all classes, and the consciousness that a nobility cannot possibly assert rights and liberties without also guaranteeing to the weaker classes their personal liberty. Since the right of property, and the family rights of the *liberi homines* had been for once and all uniformly framed, since a separate right for nobles, citizens, and peasants, was no longer possible, from this time onwards, all struggles are undertaken only with the object of securely restraining the personal government; and as long as the quarrel takes this direction, so long do we find people and clergy on the side of the nobles. Upon the foundation thus won further efforts could not tend towards asserting exclusive privileges, but only towards regulating the political sovereign rights according to law, and thus

(c) In this sense this clause was also understood in practice (below, p. 315).

gaining a constitutional co-operation. By Magna Charta English history irrevocably took the direction of securing constitutional liberty by administrative law. In this sense Hallam's words are true: "The Magna Charta is still the keystone of English liberty. All that has since been obtained is little more than a confirmation or commentary; and if every subsequent law were to be swept away, there would remain the bold features that distinguish a free from a despotic monarchy."

But because the charter forms the beginning of living constitutional rights, that is of enforceable rights, protected by permanent institutions, England has ever again recurred to it, under the best as under the worst monarchs. The place of the former "confirmation of the laws of Eadward," is now taken by the ever-repeated demand of the people for a "confirmation of Magna Charta." Its practical sense laid such great weight upon written documents, that before the close of the Middle Ages this confirmation had been thirty-eight times demanded and granted.†

† There is probably no country and no petty state in Europe which has not, at some time of pecuniary or national distress, received its Magna Charta; but these long catalogues of grievances and promises were as a rule speedily forgotten. Nothing but its practical aim of regulating the sovereign rights, and class and private law, could have availed to make the English Magna Charta the living foundation of the constitution, and could have given it the energy requisite for creating hundreds of later parliamentary statutes. The practical knowledge of political government,—a knowledge confined in those days to the temporal and spiritual magnates of that time, and which manifested itself in the formation of the official nobility after

Henry I., is remarkable. The most important difference between this Magna Charta and those of the Continent lies in its aiming to secure real legal protection for all classes of the people, without attacking or diminishing the political sovereign rights, which had been already developed. It proves to us in this direction, how personal and political liberty can only arise and become permanent through moderation and public spirit, and not through narrow-minded separation of the upper classes from the lower. In this sense Pitt once spoke those words so often quoted in the Upper House: "To your forefathers, my lords, the English barons, we owe our laws," etc. (*cf.* Mackintosh, *History*, vol. ii., *sub anno* 1215).

## CHAPTER XIX.

**The First Attempt at a Government by Estates of the Realm.**

IN scarcely any other European country did the parliamentary constitution have such a slow and difficult birth as in England. The principal cause of this difficulty, national disunion, had ceased, it is true, in the thirteenth century. But in the meantime the political government had taken an exclusive form, which did not easily admit of the insertion of a corporate estate. In an early matured development the monarchy had brought its financial, military, judicial, and police organization into a bureaucratic system which could only be controlled by a single will; and which, in case of disunion in this will, fell immediately into confusion. The prelates and the temporal lords themselves had felt this fact. Hence Magna Charta did not claim any immediate participation of the estates in the executive, but merely insisted on legal limitations to the exercise of royal sovereign rights, and in an extreme case, demanded the suspension of the personal government until the grievance was redressed.

The result confirmed only too strongly the necessity of this modest beginning. The representative committee of twenty-five barons was chosen; their names have been preserved to us, as also the writs for administering the oath to the "*communitas*." King John had, however, only accepted Magna Charta because he never intended to keep it. The charter was nowhere registered, and would have been suppressed, had the barons not circulated copies of it over the country for preservation in churches and monasteries. The Pope, intent only on the interests of the power of the Church, on demand immediately released the King from his oath. A Bull disapproved and condemned the whole proceeding, described the agreement as an illegal, unauthorized, and disgraceful compact, and declared the barons to be worse than the Saracens. The monarchy had been but taken by surprise, and still had the upper hand, even in the person of an unworthy monarch. Accordingly, John withdraws, and being lord of the financial power and the castles, collects by means of the preponderating power of the royal treasury a mer-

cenary army, for which the nobility of the country is no match, even in a righteous cause. Despairing of the issue, the insurgents call a French prince and a foreign army to their aid; a desperate struggle begins, in the course of which John suddenly dies, on the 17th October, 1216.\*

His legitimate successor was a child of nine years of age. For the first time since the Conquest the personal government was in the hands of a minor. In that stormy time the great Earl of Pembroke undertook the government, as Protector. It was the first instance in English history of a statesman at the head of a victorious party being summoned to apply conditions such as those proclaimed in Magna Charta, which he himself, although he had not drawn them up, had approved and accepted in his capacity of mediator between the conflicting parties. As a matter of fact, at the Council of Bristol, with general approbation and even with that of the papal legate, Magna Charta was confirmed, though with the omission of certain articles. It runs "*Quia quedam capitula in priore charta continebantur, quæ gravia et dubitabilia videbantur, scilicet de scutagiis . . . placuit supradictis prelati et magnatibus ea esse in respectu quousque plenius concilium habuerimus.*"

Besides the fine bold features of a national spirit that was awaking to liberty, the charter displays the first picture of an immediate contrast between State and society in an incomplete constitution, and the difficulty of reconciling this contrast. To this difficulty just those three articles were sacrificed, which contained the first basis of a constitution of estates of the realm.

(i.) Article 61 dealt with the formation of a national committee to uphold the provisions of the charter. The com-

\* Immediately after the granting of Magna Charta, John despatched an embassy to the Pope, to get quit of his oaths and promises. Already on the 24th August, 1215, the condemnatory Bull was published. The Pope, as supreme head of the Church, and feudal suzerain, repudiates the actions of the barons, and declares all that has been done not binding (Rymer, i. 2, p. 67 *seq.*), and shortly afterwards proceeds to excommunicate the barons. The dispute now took a very unfortunate course, as the barons lacked both money and unity. It was not until the landing of Prince Louis on the 21st May, 1216, that the struggle took another turn, before the final issue of which John died. The circumstances, which point to a possible,

though not probable, death by poison, have been in modern times again investigated by R. Thomson, "On Magna Charta" (1829, pp. 535-554). With John's death the situation became so much changed, that a number of the barons immediately forsook the cause of the French prince; at the council held at Bristol on the 11th of November, 1216, the papal legate releases the barons from their oaths to the prince, and then occurs the first confirmation of the charter (1 Henry III.), with the omissions which Blackstone has enumerated, pp. xxix.-xxxi. (see also "Select Charters," p. 399). For the French prince matters now take such a turn, that he withdraws with the tolerably favourable articles of peace of the 11th September, 1217.

mittee of resistance had been called into being, but its appointment had resulted in a civil war, in which the barons had paid allegiance to a foreign prince. The first act of their resistance was thus marred by a blot, which in the changed condition of things after John's death at once led to dissensions among the barons themselves. The article accordingly was tacitly allowed to drop as rendered nugatory by the disappearance of the cause. In the following decades the party of the nobles involuntarily returned to the practice of the committee of resistance; it was reserved for the following period to frame a constitution, which was able to maintain itself without the rude help of violence.

(ii.) The clauses dealing with the voting of scutages and extraordinary aids by a *commune concilium regni* (Arts. 12 and 14) were omitted, and also their extension to the *auxilia* of the city of London. The barons, under the Protector, now stood in the room of the King, and could not well resign the many fertile sources of income for the carrying on of the Government, arising from demesnes, forests, and the protection of Jews. But the convocation of a tax-imposing assembly (in the meaning of Article 14) seems to have appeared impracticable to the Protector and his friends, and for very simple reasons. The ever-recurring phenomenon, that the first constitutional ideas, which immediately proceed from a resistance to the political power, are incapable of realization, is thus confirmed. As the convocation of a national council was only to take place on account of the *scutagia* and *auxilia* of the King, only vassals who paid to the Crown could have been thereby intended, that is, the *tenentes in capite*, but of them every one. But were then greater and lesser Crown vassals to be summoned without distinction, whilst the great lords were still loth to concede to the hundreds of squireless knights and petty possessors of plots of land, a real equality with themselves? The great vassals could not exclude their *pares* in feudal possessions from that right of assenting; and yet in the customs of the past no ground was discoverable for allowing them a curtailed right of voting. A return was accordingly made to that old custom of court-etiquette, according to which, the distinguished lords had been hitherto summoned to court by letter, "*sigillatim per litteras nostras*." If all the rest were only summoned collectively by the *Vicecomes*, it might perhaps be presumed that the majority of them would not appear. But still a parliament after the Polish fashion would have arisen, with hundreds of representatives consisting of petty possessors of single small estates. Still less inclined would the great prelates feel to deliberate on an equal footing with the lesser abbots and

barons, or with an excessive number of lesser knights. Hence can be explained, why the assembly thus projected was never brought together, and why that clause was never comprised in any later promulgation.

(iii.) The clause concerning the *amerciaments* of the barons *per pares suos* (Art. 21) was indeed retained in word; but was immediately interpreted by practice to mean, that those *amerciaments* should be recognized in the Exchequer or in the King's Court, *per barones de scaccario, vel coram ipso rege* (Bracton), or *coram consilio regis*, as it runs in a writ of 8 Hen. III. The regency of the barons itself thus acknowledges that the law has been satisfied if the matter has been referred to a commission consisting of vassals of the Crown—just as the *judicium parium* has in general been hitherto treated. The result was the concession of a legal hearing before the supreme tribunal.

In like manner the further course of the constitutional struggle proves the truth of the remark, that the most righteous resistance to despotism, and the noblest aspirations of a national spirit, are not sufficiently powerful to immediately found political liberty, but that continuous labour and a positive reformation of the political system are needed; and to these *Magna Charta* was only able to give the impulse. After some degree of tranquillity had been restored, a second confirmation of the Great Charter took place in the autumn of 1217, with the omission of the clauses referring to the estates, but with the grant of a new *charta de foresta*, introducing a vigorous administration of the forest laws. In 9 Henry III. *Magna Charta* was again confirmed, and this is the form in which it afterwards took its place among the statutes of the realm.\*\*

\*\* As to the confirmations of *Magna Charta*, a second confirmation takes place (2 Hen. III.), again with some alterations, which are classified by Blackstone, xxxvi.-xxxviii. (*cf.* Charters, 344). Among the additions is a clause relating to the removal of the adulterine castles of the barons and another against alienations to mortmain. The new confirmation takes place in 9 Henry III., on the 11th February, 1224, again with certain changes (Charters, 353). The admission of the last-named version among the English collections of statutes is so far correct, as from this time onward no further changes were made in the text. All later confirmations refer to the text as thus established. Some mistakes arose purely from the fact that it was not the original document of 9 Henry

III. (Blackstone, 60-67) that was copied, but that the text was taken from an *Insuperimus* under Edward I. In the February of 1226 Henry III. undertakes nominally the government in person, without confirming *Magna Charta* afresh (*cf.* below, note 1). Blackstone, however, does not speak of this as a revocation, but only says: "The King is said to have revoked all the charters of the forest" (Matth. Paris). At the confirmation of 49 Henry III., 1264, when Henry was the captive of the barons, the clause touching the committee of resistance (Art. 61) was again adopted into it, with the omission even of the security reserved to the royal person and family; without, however, after the King's liberation, any notice whatever being taken of it. From 28 Edward I. until the latest confirmation

Two years later, Henry III. personally assumes the reins of government at the Parliament of Oxford (1227), and begins his rule without confirming the two charters. At first the tutorial government still continues, which had meanwhile, even after the death of the great Earl of Pembroke (1219), remained in a fairly orderly condition. The first epoch of sixteen years of this reign must therefore be regarded purely as a government by the nobility under the name of Henry III. The regency had succeeded in removing the dominant influence of the Roman Curia by the recall of the papal legate, Pandulf, to Rome (1221), and in getting rid of the dangerous foreign mercenary soldiery (1224). To raise an extraordinary revenue by means of aids and scutages, conventions of prelates and barons were at this time repeatedly summoned; not indeed according to the letter of Article 14 of the charter, but in such a manner, that according to the discriminating judgment of the regency in conjunction with the prelates, the most illustrious members of the barony were summoned in comparatively large numbers, who then, after some discussion, granted the subsidies demanded. (1)

With the disgraceful dismissal of the chief justiciary, Hubert de Burgh, there begins a second epoch of a personal

(4 Hen. V.) twenty-nine resolutions were passed by Parliament confirming the charter, of which not less than fourteen were in the reign of Edward III.

(1) The general history of this period has been impartially written by Lappenberg-Pauli, iii. pp. 489-875. Compared with the older descriptions, the Peers' Report on the dignity of a Peer contains the most sober criticism. An authentic digest of the information respecting 135 *concilia*, and similar assemblies under Henry III., has been given by Parry ("Parliaments and Councils," pp. 24-49). For the first epoch of sixteen years the following events must be regarded: In 2 Henry III. (Council of St. Paul's): second confirmation of Magna Charta, for which the prelates, earls, barons, knights, "*et libere tenentes omnes de regno*," vote a fifteenth. In 9 Henry III. (*curia* of Westminster, 25th December, 1224): solemn confirmation of the two charters, combined with the voting of a fifteenth. In 11 Henry III., January, 1227 (council of Oxford): the King personally assumes the Government. "The King declares himself of age, and by his own authority cancels the two charters, as made and signed when he was not his own master, and on the ground he was not

bound to keep what he was forced to promise" (Parry 27 quoting Matthew Paris, Hody, 304). The correctness of this assertion, which has not been otherwise confirmed, is however rightly doubted, as the government by the nobles, which still continued, had certainly no interest in setting aside Magna Charta. In 15 Henry III. (*colloquium* at Westminster): an *auxilium de quolibet scuto* was demanded. The secular magnates consented; the prelates asserted that ecclesiastical persons were not bound to submit in this matter to the resolutions of laymen. The aid was, however, granted after a prorogation a few months later. In 16 Henry III. (7th March, 1232, *colloquium* of Westminster): an *auxilium generale* was demanded. The temporal Crown vassals declared that they were not bound to any aid, as they had done personal military service out of the kingdom. The prelates gave the evasive answer, that many of their invited members were not present. On the 14th September (*colloquium* of Lambeth), however, the grant of a subsidy was made, in the name of the clergy, and the earls, barons, knights, and *liberi homines et villani* (Foedera, 16 Hen. III.).

rule of Henry III. (1232-1252), which for twenty continuous years, presents the picture of a confused and undecided struggle between the King and his foreign favourites and personal adherents on the one side, and the great barons, and with them soon the prelates, on the other. Untaught by the evil experiences of favouritism shown to foreigners under Stephen and John, the weak and frivolous King put himself at once entirely in the power of foreign favourites. The conduct of the business of the State by Bishop Peter des Roches (of Poitou), called forth a storm of indignation among the temporal magnates. At the *colloquium* at Oxford (17 Henry III.), the earls and barons refuse to appear in person, and declare "that they will never obey the summons of the King, but will choose a new King, unless he dismisses the Bishop of Winchester and the lords from Poitou." When on the third summons the barons appeared armed, the King declared sentence of banishment and confiscation of their estates. At the next *colloquium* at Westminster, the Primate threatens the King with excommunication unless he changes his mode of government. The King on this occasion gave way; he dismissed the Bishop of Winchester and the objectionable counsellors, and declared an amnesty with the refractory barons; and then began for a few years tolerably friendly relations with the magnates, who still continued to grant the necessary supplies. (2)

But the incapacity and the incorrigible frivolity of Henry III. very soon aggravate his position. The King's uncle and his relations again form a court government, his French kinsmen seize upon the great offices and fiefs; and in order to obviate the probable opposition of the magnates to the

(2) The authoritative precedents of this period are: In 19 Henry III. a council of the prelates, barons, and "all other Crown vassals," who vote a considerable *auxilium* (Close Rolls, 19 Hen. III.). In 20 Henry III. (20th January, 1236), *curia* of Merton, at which the *provisiones*, *assises*, or *statuta* of Merton are resolved by the spiritual and temporal barons present, "which have been from time immemorial considered as the oldest act of statute law" ("Parl. History," i. 32; Coke, "Inst." ii. 96). The Peers' Report (i. 460) acknowledges that the authority of a small number of barons so summoned, must be still considered as sufficient for legislative acts. The enactment itself calls itself a "*provisio*;" the name often used at an early epoch "*Statuta*," is often explained by saying, that for the first

time the publication of a formal decree of the realm had taken place; but the form and framing of the *Rotulus* had nothing unusual in it. It is rather simply the language of Normandy, according to which men gradually began to call the more important enactments, "*etablissemens*," or *statuta*. In 21 Henry III. (council of Westminster), the prelates, earls, barons, *milites et liberi homines pro se et suis villanis*, grant a thirteenth of personalty. In 22 Henry III. (council of London), the magnates appear armed, and after long discussion the King promises on oath to carry on his government by means of a definite number of distinguished men. In 24 Henry III. (council of London), the bishops produce thirty articles against the King, relative to violations of Magna Charta (Hody, 320).



ministers of the Crown, the great offices of State begin to be left unoccupied, the central administration being conducted by office clerks. In this critical time one special incident again occurs, a confirmation of Magna Charta. In 21 Henry III. the King finds himself, in consequence of pressing money embarrassments, again compelled to make a solemn confirmation of the charter, in which once more the clauses relating to the estates are omitted. Shortly afterwards, as had happened just one hundred years previously in France, the name "*parliamentum*" occurs for the first time (Chron. Dunst., 1244; Matth. Paris, 1246), and curiously enough, Henry III. himself, in a writ addressed to the Sheriff of Northampton, designates with this term the assembly which originated the Magna Charta: "*Parliamentum Runemede, quod fuit inter Dom. Joh., Regem patrem nostrum et barones suos Angliæ*" (Rot. Claus., 28 Hen. III.). The name "*parliament*," now occurs more frequently, but does not supplant the more indefinite terms *concilium*, *colloquium*, etc. In the meanwhile the relations with the Continent became complicated, in consequence of the family connections of the mother and wife of the King, and the greed of the papal envoys. The foolish compliance of the King with all demands, and the waste of the pecuniary resources of the country in the vain endeavour to maintain the English influence upon the Continent, tended more and more to impel the spiritual magnates to head the opposition against the King and against the Pope. From the year 1244 onwards, neither a chief justice nor a chancellor, nor even a treasurer, is appointed, but the administration of the country is conducted at the Court by the clerks of the offices. The conventions of magnates met these proceedings by violent public complaints, refusal of subsidies, repeated demands that their counsellors should be appointed to the offices of State, and finally by an accusation of treason preferred against the justiciary, Henry de Bath. (2\*)

(2\*) The important precedents in this period are: In 26 Henry III. (1242), a council was held at London, at which were present "*omnes Angliæ magnates*." The royal writ for this assembly is important, as it contains the express summons to deal with State business; "*ad tractandum nobiscum una cum cæteris Magnatibus nostris quos similiter fecimus convocari, de arduis negotiis, statum nostrum et totius regni nostri specialiter tangentibus*." After long discussion an aid for the war against France was refused, and a written protest sent in (Peers' Report, iii. Appendix I.). In

28 Henry III. (Council of Westminster Hall), prelates and barons deliberate separately. By common consent of both, a commission was appointed to draw up definite articles to be sanctioned by the whole assembly; which articles were to regulate the conduct of the King, the appointment to the great offices, etc. This joint declaration of the estates, however, was rejected by the King, and the assembly was prorogued. In the assembly when again convoked, the King promises to observe the liberties which he swore at his coronation (1220) to maintain. A

With the year 1252 begins a third epoch of this reign of fifty-six years (1252–1266), in which the King comes under the dominant influence of the barons. Till then the discontented magnates had lacked a proper leader. They now obtained leaders in the powerful Earl of Gloucester, and the politic Earl Simon de Montfort, brother-in-law of the King. To the internal and external complications there now is added the foolish endeavour to gain the Crown of Sicily for the King's son. After long discussions the treaty for this purpose was concluded, in which Henry involved himself in serious obligations to the Pope. The incapable internal government had fallen into a chronic state of pecuniary embarrassment, whilst the estates of the realm refused to raise demands of hitherto unheard-of amount. The vacillation and faithlessness of the King, his incapacity to conduct the external and internal affairs of his realm, his refusal to choose any suitable counsellor, led the discontented magnates to revert to the idea of a protectorate or regency, such as had been carried on with tolerable success during the first sixteen years of the reign. They no longer hesitate to obtrude the leading officers upon the King. (3) Without calling in question

*scutagium* of twenty shillings is voted for the marriage of his eldest daughter (Hody, 322). In 29 Henry III., the magnates refuse an aid for the campaign against Wales. In 30 Henry III. (1246), a great assembly was held at London, which is first called a *Parliamentum* in Matth. Paris, A.D. 1246 (*cf.* Rot. Cl., 28 Henr. III.). The next instance of the use of the term in an official document is 42 Henry III. (Peers' Report, i. 91, 99, 461). In 32 Henry III., a council at London refuses an aid, and presents a list of national grievances, which the King promises to redress. In 33 Henry III. (council of London), the magnates demand that they shall have a voice in the appointment of the chancellor, chief justice, and treasurer. At this time Henry III. endeavours by popular administrative measures to gain influence against the dissatisfied barons. He personally assembles the sheriffs in the Exchequer, commends to their protection the Church, and the widows and orphans; a villein is not to be distrained on for the debts of his lord, except in case of exigency; the conduct of the lords towards their tenants is to be watched over, and the latter are to be protected against excesses; the sheriffs are not to let the under districts in the hundreds and other bailiwicks at rack rent, etc. In

35 Henry III., an assembly was held in London at which the justiciary, Henry de Bath, was indicted on a charge of high treason. In 36 Henry III., at the parliament of Westminster the papal demand of a tithe from the manors of the prelates for the Crusade was opposed, on the ground that their grievances must first of all be redressed.

(3) The precedents in the third period are: In 37 Henry III., the clergy vote a tithe for the Crusade, the knights a *scutagium* for the campaign in Gascony. Both charters of liberties were again confirmed. In 38 Henry III. (27th January, 1254), a council takes place in London, with a formal summons to State business (*ad ardua negotia nostra*). The temporal prelates refuse a grant of money; the bishops and abbots promise an aid for the case of necessity, but only for themselves, and not for the rest of the clergy (Peers' Report, i. 93, 94). On the 26th April, 1254 (council of Westminster), under the regency, in the absence of the King, the magnates having bound themselves to follow the King to Gascony, *cum equis et armis*, the sheriffs are instructed, in like manner, to summon to service all the rest of the Crown vassals who possess twenty *libratas terre in capite*, and to send in addition each two *legales et discretos*

the royal ruling power, all the struggles at this time directly refer to the subject of appointments to the chief offices in the King's council. In the year 1248, the barons had raised afresh their complaint against the "favourites," particularly on the point that neither a chief justice, nor a chancellor, nor a treasurer, had been appointed "in parliament." In order to appease them another confirmation (1253) of the charter took place at a convocation of the prelates in the great hall at Westminster, accompanied by the greatest ecclesiastical ceremony, with anathemas and threats of excommunication against every transgressor. Henry swears to maintain the charter "so surely as he is a man, a christian, a knight, an anointed and crowned King." Amidst much confusion and rumour of war, these struggles reach their climax at the council of Oxford (1258), afterwards called the "Mad Parliament," at which the discontented magnates resolve to appoint a sort of protectorate government. The difficulty lay principally in the factions among the magnates themselves; and in the participation which the lesser Crown vassals (the *bachellaria Angliæ*) now claimed in these measures. Therefore a kind of electoral system had to be invented in order to concede a share to these parties as well as to the lesser *tenentes in capite*. Thus an artificial and complicated system of electoral proceedings was arrived at, which was apparently borrowed from that in use for compacts, arbitrations, and ecclesiastical meetings, where there were two definite and opponent parties (Stubbs, ii. 77). Twelve of the royal council and twelve barons were to meet together and appoint a permanent council of fifteen, which actually for some time took upon itself all the powers of the royal government. The constitutional ideas of this period

*militēs* to the council. In 39 Henry III. (parliament at London), the King demands an *auxilium*. The estates claim strict adherence to the charters, and the appointment of the chief justice, the chancellor, and treasurer, who are not to be removed, "*nisi de comuni regni convocati concilio et deliberatione*." The assembly was prorogued. On its re-assembling, the magnates, on an aid being demanded for the war in Sicily, declared that the King had embarked on that affair, "*sine concilio suo et consensu baronagii*;" that they had not all been summoned according to the provisions of Magna Charta, and that they would not therefore give any answer, and grant any aid without the co-operation of the rest. In 40 Henry III. (parliament at Westmins-

ter), the magnates and clergy repeatedly refuse an aid for the war in Sicily. In 41 Henry III. (parliament at London), the King, on his promising faithful observance of the charters, receives an extraordinary aid from the clergy; three weeks later, at Westminster, however, both estates again refuse the aid for the war in Sicily. In 42 Henry III. (10th April, 1258) (parliament at London), the barons hold out the prospect of a *commune auxilium*, if the King will consent to reform the administration of the realm. The King promises on oath that this shall be done by twelve *fideles* of his council, and twelve other *fideles*, who shall be chosen by the *proceres* themselves.

are the expression of the views of the barons as a class on the subject of their participation in the political government; a parliament three times a year; annual appointment of the chief justice, chancellor, and treasurer in parliament; the barons to undertake to guard the royal castles; the sheriffs in future to be chosen by the counties. On the other hand, the barons shall be no longer bound to appear as suitors before the sheriff. (3<sup>a</sup>)

The regency based upon these ideas procures obedience to be sworn to itself, then expels the King's nearest relations, and prolongs the tenure of offices in its own interest. On this point fresh dissensions arise among the nobility. An attempt at mediation by King Louis of France results in an advantage to the King, who for a short time once more gains the upper hand. But the confederation of the nobles under Simon de Montfort now has recourse to arms, and the King is taken captive in the battle of Lewes (12th May, 1264); Magna Charta is again confirmed, a new regency appointed in the name of the King, and an assembly of twenty-three barons of the party of nobles convoked as a "*parliamentum*." But the victorious party meets from the first with but doubtful obedience. The county officers appointed by it manifest an arrogant and arbitrary behaviour. During the reaction, and the disunion of the leaders which soon again ensued, Prince

(3<sup>a</sup>) On the 11th June, 1258, the prelates, earls, and "nearly a hundred barons" appeared at this meeting at Oxford, which in a royal "letter of safe conduct" of the 2nd June is called a *Parliamentum*. Each party chooses for themselves twelve for a committee of twenty-four, these twenty-four then choose four from their number, and the four thus elected form the royal council of fifteen persons. The committee thus elected of twenty-four, demands first of all the faithful observance of the charters which have been so often sworn to. The appointment of the chief justice, chancellor, treasurer, and other officers to be elected annually shall for ever reside in the committee. Three times a year a parliament is to be held: on the 6th of October, 3rd of February, and 1st of June. In these judicial assemblies, the chosen counsellors of the king shall appear (whether they be summoned or no), to deal with the common business of the realm, in so far as the King commands it. For this purpose twelve persons were appointed (two bishops, one earl, nine barons), to represent the *communitas* in such further

deliberations, and especially in undertaking the burdens of the *communitas*. The "twelve *probes hommes*, with the King's council in the three parliaments, shall deal with all the public affairs of the nation; and the *communitas* shall accept as settled what the twelve do." Other ordinances also were resolved upon. The assembly chose a special committee of twenty-four (three bishops, eight earls, thirteen barons), to deliberate upon an *auxilium*, on which matter, however, no final decision was arrived at. A decree further ordained that in each county "*quatuor discreti et legales milites*" are to be chosen to deliberate on the national grievances and report thereon at the next parliament. These are the main characteristic resolutions of the Mad Parliament at Oxford, which the Peers' Report, i. 101-127, treats of in detail. In consequence of the application of the elective principle, the central government now fell into the hands of an elected national ministry, consisting of fifteen persons, the majority of whom were hostile to the King, and thus begins a systematic party government.

Edward succeeded (28th May, 1265) in escaping from the captivity in which he had been kept by the barons, and with a hastily collected army of followers surprised the insurgents. After the battle of Evesham, in which Simon de Montfort himself was slain, the party of the barons appear in the course of a few months to have been entirely scattered. (3<sup>b</sup>)

The fourth and concluding epoch of this reign takes externally a quiet course with the conclusion of peace, an amnesty, and the arbitrators' awards (dictum of Kenilworth). The King once more takes back the power of appointing to offices. Such of the rules laid down in the provisions of Oxford as are not at variance with the royal prerogative, are confirmed

(3<sup>b</sup>) The resolutions of Oxford proved in the event that it was impossible to apply a principle of election to the informal and inharmonious vassals of the Crown in England. "Almost a hundred barons" had appeared at Oxford; but even this comparatively small number of lesser Crown vassals was sufficient to pass extravagant resolutions. Those members elected by the lesser vassals appeared only as representatives of the claims of the feudal nobility. In the elections the Church was most grudgingly dealt with. But most of the lesser knights also were yet ill satisfied with the committee of estates of twelve, which was to represent them once and for all. Even in the next parliament (8th October, 1258), the "*Communitas bachellaris Anglie*" sends in a sort of loyal address and a complaint directed to Prince Edward. The disunion among the barons increased. In 45 Henry III. (parliament at Winchester, 1261), the King lays before them a papal bull, by which he has been released from his oath to observe the provisions of Oxford, and which in like manner absolves the prelates and laity from their oaths in respect of all decrees prejudicial to the King. The Bishop of Worcester and Simon de Montfort, on the other hand, summon for the 21st September, 1261, an assembly at St. Albans, to which three knights are summoned from each county. The King summons for the same day a council at Windsor, and commands the sheriffs to send the said knights to the King, and to no one else, "*supra promissis colloquium habebunt.*" The subsequent parliaments in vain negotiate with the view to a compromise. In 48 Henry III. (parliament 13th December, 1263), the dispute between the King

and the barons is referred to the judgment of the King of France, as arbitrator. This judgment is published, and declares the provisions of Oxford null and void. In 48 Henry III. (parliament at Oxford, 30th March, 1264), the barons adhere to the assertion that the provisions so solemnly sworn to, were based upon Magna Charta, and declare to abide by them until the end of their lives (Hody, 359). Immediately afterwards the barons' war breaks out; the King is vanquished and taken prisoner in the battle of Lewes, on the 12th May, 1264. On the 25th of May peace is proclaimed; in twenty-nine counties conservators of the peace were appointed, and writs (dated 4th June, 1264) are issued summoning a parliament, to which also "*quatuor de legalioribus et discretioribus Militibus Comitatus, nobiscum tractaturi de negotiis predictis,*" were summoned. At this parliament, held at London, decrees were issued by the prelates, barons, and the *communitas terre* there present, *pro pace regni*. But now a rupture takes place between Montfort and the Earl of Gloucester. In 49 Henry III. (20th January, 1265), a parliament is held in London, to which were summoned the Archbishop of York, twelve bishops, sixty-five abbots, thirty-six priors, and the Master of the order of the Templars, and also five earls, and seventeen barons, the last named probably all belonging to the party of Simon de Montfort (Peers' Reports, i. 141-145). But there is besides, a clause to the effect that the *Viccomites* are to send two knights from every county, the cities and burghs two citizens, and the cinque ports each four men to the assembly (see note at end of the chapter).

by the King with the consent of parliament; and after severe trials we find Henry again in the parliament at Marlebridge, regulating the affairs of the nation as law giver, though he has given up his foreign favourites, and has repeatedly confirmed Magna Charta. (4)

The parliamentary progress in this chain of events touches two points:

(i.) The right of the Crown vassals to assent to the imposition of *scutagia* and extraordinary aids, is established by more than twenty precedents, and indeed as much by grant as by refusal.

(ii.) In connection with the tax-voting assemblies, the participation of the magnates in the promulgation of royal ordinances also revives. A number of the legislative resolutions of this period were, in the later judicial practice, put on the same footing with the subsequent parliamentary statutes, and were enrolled among the collections of laws; notably, the *Provisiones de Merton* (Rotuli, cl. 20 Henry III.), and the so-called *statutum de Marleberge* (Rotuli, cl. 44 Henry III.), etc. This last is at the outset described as "*provisiones, ordinationes et statuta subscripta*," and is simi-

(4) The important precedents in the fourth period are: In 49 Henry III. (parliament at Winchester, 8th September, 1265), the bishops were summoned with the exception of the four bishops belonging to Montfort's party. Also a number of secular Crown vassals, including the widows of the earls, barons, and knights, who had been slain or taken prisoners in battle. The landed estates of the rebels were confiscated and distributed amongst the "friends of the King." The frivolous and faithless conduct of the King, however, caused the Earl of Oxford again to appeal to arms, and to play the part enacted in later times by Duke Maurice of Saxony. In 50 Henry III. (24th August, 1266, parliament at Kenilworth), a commission of three bishops and three barons was appointed by the King *et a baronibus consiliariis Angliæ*, to provide for the welfare of the country, and for those who had been disinherited. Those six are, in like manner, to choose six others. The papal legate and Prince Henry are to decide as umpires. The so-called *dictum* (award), of Kenilworth was agreed on. At the parliament held at Northampton on the 26th of October, the verdict of the twelve was published and confirmed. The partisans

of Montfort were restored to their possessions on payment of five years' income, or less, from their estates, according to the gravity of their offence. On the 18th of November, 1367, a parliament or *commune concilium regni* was held at Marlborough, "*ad meliorationem regni et expeditionem justitiæ*." There were present, besides the *magnates et discreti*, also the chief justice, the chancellor, the judges, and others of the King's council. The resolutions, under the name of the "*Statuta of Marleberge*," must always be considered as a portion of the national legislation (Peers' Reports, i. 159). In 53 Henry III. (parliament at Westminster), the *potentiores* of the cities and burghs, as well as the magnates, were invited to the solemn translation of the bones of Eadward the Confessor to Westminster Abbey. After the close of the ceremony the *nobles* form a parliament and grant a twentieth with the consent of the *regni majores* (Peers' Report, i. 161). In 55 Henry III., on the 13th of January, 1271, at a parliament of the magnates held in London, the lords and others who had been disinherited were completely restored to their possessions *per commune assensum*. In the following year Henry III. died.

lar in form and contents to the statutes published under Edward I.\*\*\*

Among the varying fortunes of these struggles, the advance of the Crown vassals towards a constitutional position is unmistakably evident. After numerous confirmations so much had been achieved, that even at the climax of each successive reaction there is no longer any question of a repeal or curtailment of Magna Charta. The omission of articles 12 and 14, which dealt with the grant of *scutagia* and *auxilia*, was compensated for by an effectual practice of grant and refusal. All circumstances appear to concur favourably to originate a constitution of the estates of the realm. A weak and faithless monarch endeavours to get rid of the disagreeable guarantees of Magna Charta; he is forced on five different occasions solemnly to recognize their validity. He endeavours in the old way, with the help of favourites and official clerks, to restore personal rule; the power of the prelates and barons drives him to dismiss these counsellors, to banish them, and to accept the great officers who are directly forced upon him. His chronic state of pecuniary embarrassment compels him constantly to assemble parliaments; but almost every demand is met by statements of national grievances, which the Government sees itself compelled to redress. Prelates and barons vie with each other in an opposition, which is based upon the memories of the Great Charter, upon common interests, upon an increasing respect for class interests and associations, and upon the weakness and perverseness of the King. The discontented barons at length find a leader in Simon de Montfort, the brother-in-law of the King, a magnate renowned alike as a statesman and a general. Under such leadership the nobles succeed for the first time in vanquishing the monarchy in open battle, and in taking captive the King and the heir to the throne.

And yet the great successes of the barons are neutralized with marvellous rapidity; no parliamentary constitution results from their victory, in the sense of the feudal constitutions of the Continent; because as a fact the material conditions of a parliamentary constitution were still wanting, alike in the form of the governmental power, and in the formation of the estates.

\*\*\* It is from the precedents given in notes 1-4 that the above results, viz. the right of the barons to assent to the extraordinary aids, and their participation in the most important decrees of the King, are deduced. From the so-called Statute of Merton onwards, a number of these ordinances were adopted into the later collections of

laws, most completely into the "Statutes of the Realm" (1810), edited by the Record Commission. The most notable are the *Provisiones de Merton* (statutes, p. 1), the *Statutum Hibernie* (p. 17) the provisions touching leap year (p. 7), the *Dictum de Kenilworth* (p. 12), the *Statutum de Marleberge* (p. 19).

In the first place, the royal rule had still the character of absolutism. All sovereign rights still appeared as emanations from a personal will. The possessions and rights of the dominant class, the position of the vassals of the towns, every form, normal or exceptional, of the liberties and franchises, was still based upon the personal decrees of the king. The limits of this power had indeed been indicated in general outlines by Magna Charta ; but the executive laws were still wanting which were to introduce these principles into the practice of the Exchequer, and of the royal county and local magistracies. Against the decided personal will of the king, neither the committee of the King's court, nor the bureaucratic Exchequer afforded a reliable protection. How should the discontented magnates in such a constitution establish a check upon the squandering of the national resources, the abuse of the discretionary military, financial and judicial powers, unless they themselves exercised these powers? All political administration was so framed as to receive its impulse directly from the King and his personal advisers. This bureaucratic form turned all the influence exercised by the magnates in the direction of appointments to the great offices and the shrievalty. They were thus in the most direct way placed in possession of the power ; but the influence and the sagacity even of the most clear-headed leader could not hinder the immediate abuse of this power ; an abuse which was at once itself felt by the opposite party, as well as by the lower classes, and incited them to resistance. Every exercise of the rights of sovereignty was regarded by jealous partisans as despotic ; and every refusal of a favour was interpreted by adherents as an insult and a reason for revolting. Without any fault, so far as is proved, of the great leader, the unlimited power was converted into a party instrument in the hands of the victorious, but politically speaking inexperienced party. The dissatisfaction and reaction that ensued, restored the so-called "King's friends," i.e. foreign adventurers, covetous dependents, and officious clerks to their former positions. As the monarchy is in no direction equal to the situation, there arises that wavering and apparently aimless struggle which we have seen.

But regarded from below also, the Crown vassallage still lacked the form for an adequate representation as a collective whole. Their feudal position excluded the sub-vassals, as it did all the other freeholders, from equality with the Crown vassals. In this period the Crown vassals still comported themselves as the *communitas terræ*, as a matter of course and in good faith, knowing that they had the nation at their back. In another direction, however, the *esprit de corps*, and



the self-esteem of military honour confirmed the lesser King's vassals in the idea of their being *pares*; whilst the princely lords, who were related to the royal house, and also the prelates, refused to recognize such an equality, which in point of numbers would have placed them in a modest minority. An election of representatives of the inferior nobility to attend a *concilium regis* could no more be successful in those times than at the present. If real political performances were to be represented, the thousands of sub-vassals, the freeholders and the towns were of greater importance than the lesser barons. The attempt to allow only a hundred "barons" at the Parliament of Oxford to participate at the election of a national committee, resulted in an immoderate assertion of feudal claims. The personal rule is followed by a personal opposition rule with confiscations, banishments, and bloody struggles, in which on both sides the followers are sacrificed, whilst the great lords introduce among one another private warfare, letters of challenge and all the ceremonial of chivalry; a state of things which, under an impotent and perverse Government, appears worse than the previous national grievances.

There was still something incomplete in these constitutional conditions which neither the spiritual nor temporal barons were able of their own energy to surmount. It consisted in the onesidedness of each social class interest, so that each party of the barons after gaining the victory, knew of no other use for the absolute political power, than to advance and enrich themselves and their party. In like manner from those party struggles no form was discoverable for giving the lesser barons a constitutional position by the side of the greater, and for securing to the freeholders of the land the portion belonging to them, side by side with both. Only the negative experience had as yet been made that it was unadvisable to form the inferior nobility into a body of electors. The politic leader of the party of the nobles had, it is true, found a form for the representation of the larger *communitas*, but it was once more lost in the party conflict. It was reserved to the able successor of Henry III. to develop the third element which was still wanting in the representation of the State.

That third factor is the *collective body of the sub-vassals and the freemen of England*. The *communitas* of the counties and cities had been hitherto excluded by the feudal system from immediate participation in national affairs. This defect had been involuntarily acknowledged on all sides. From the commencement of the reign of Henry III. the attentions paid to them are increased. They are requested to bring

forward, by deputies, their complaints against the sheriffs; they are employed in reforming and raising the taxes; they are offered the election of their own sheriffs; and in 1258 they are invited to choose two knights "*vice omnium et singulorum*," in order that these shall appear to deliberate upon the *auxilia*, "*coram consilio regis*." In 1261 Simon de Montfort summoned three knights from each county to a deliberation upon the "State business," whilst the King invited the same deputies to his council at Windsor. But after Henry had been taken prisoner, Simon de Montfort summoned, in the King's name, two knights from each county, and two citizens from a number of townships to a national council on the 28th of January, 1265; and so in a certain sense this epoch may be said to close with the birth of the Lower House.

NOTE TO CHAPTER XIX.—The germs of a representation of the shires and cities by chosen members appear at the close of this period as first attempts. In the older political controversial writings erroneous stress was laid upon events which contain nothing about the participation of shires and cities in the voting of taxes and in legislation. The oldest precedent is said to have occurred in 15 John, in a military summons, containing the following clause: "that *quatuor discreti milites* from each shire shall be chosen in the first county court *ad loquendum nobiscum de negotiis regni nostri*." Here only confidential men are meant, with whom the King wishes to deliberate at the time when the invasion from France was threatening; the question is here neither one of laws nor of the granting of aids, nor does it appear whether the assembly was actually held or not. In 10 Henry III. (1226) writs were addressed to the sheriffs of Gloucester and of seven other counties, with the command to have *quatuor milites de legalioribus et discretioribus* chosen by the *milites* and *probi homines* of the shire. But the *quatuor milites* are only to appear as indicators of the *Viccomites* concerning a violation of Magna Charta. In 58 Henry III. (council at Westminster) the sheriffs were ordered each to send two *legales et discretos milites* to the council, "*vice omnium et singulorum eorundem ad providendum, quale auxilium nobis in tanta necessitate impendere voluerunt*." In like manner, writs are addressed to the bishops with directions to assemble the "*archidiaconos, viros*

*religiosos, et clericum*" in their dioceses to deliberate upon a subsidy. The lower clergy are then to send their proxies and report their resolutions. The Peers' Report (i. 56) acknowledges this to be the first documentary evidence of an attempt to send representatives of corporations to a council. But the question is here only one of a participation of the lesser vassals of the Crown in a deliberation touching extraordinary aids. Now for the first time the attempt was made to grant them a definite share in the proceedings side by side with the greater barons, in the person of two representatives chosen from their midst, instead of the general collective summons by the sheriff, projected by the charter. In like manner the two knights mentioned in the writ, were not summoned direct to parliament, but only to appear "*coram concilio nostro*" (Parry, *Parliaments*, xiii.). This event is of importance as being the first form of a representation, though only of the Crown vassals, and only for money grants. In 42 Henry III., at the Mad Parliament at Oxford, this elective principle adopts a new form, about a hundred barons being convened to the parliament itself, that is, for the most part *lesser* barons, and a committee of twelve chosen from those there assembled; an application of the principles of suffrage, which at last leads to a civil war. But here also it is only the Crown vassals that are meant. In the summer of 1261 (45 Henry III.), the Bishop of Worcester and Earl Simon convoked an assembly at St. Alban's for the 21st September, 1261, with

the order that three knights of each county should appear, to deliberate in common upon national affairs. The King, on the other hand, fixed the same day for a council at Windsor, and commanded the sheriffs to send the said knights to the King "*supra promissis colloquium habituri*." This was certainly an attempt to convene representatives of the shires for a legislative assembly (Peers' Report, i. 133); but it was made in a tumultuous and discordant manner, and its result was so unsuccessful, that it could not rank as a precedent. In 48 Henry III., at the Parliament held in London on the 24th of June, 1264, whilst the King was the prisoner of the barons, by orders issued to the conservators of the peace four knights were summoned from each of twenty-nine shires in the following formula: "*Vobis mandamus quatuor de legalioribus et discretioribus militibus dicti comitatus, per assensum ejusdem comitatus ad hoc electos, ad nos pro toto comitatu illo mittatis. Ita quod sint ad nos Londini, in octavis, etc., nobiscum tractaturi de negotiis nostris et regni nostri predictis*." But the question here touches only the restoration of the national peace, and a deliberation concerning it, with four trusted men. As the "*fideles nostri*," are mentioned, it is evident that only Crown vassals can be intended. It is likewise proved that the grant of a twentieth in this year was only made by the *prælati et magnates*. (Parry, *Parliaments*, xiii.). It was not until 49 Henry III., at a Parliament held in London, on the 20th of January, 1265, that the first precedent of the summons of deputies of the shires and cities occurs. The King, who was still a prisoner of the barons, issued personal writs to one hundred and twenty-two clergy and twenty-three temporal barons, "*ad tractandum nobiscum et cum concilio nostro, necnon et aliis arduis regni nostri negotiis*." And then further, "*Item mandatum est singulis Vicecomitibus per Angliam, quod venire faciant duos milites de legalioribus et discretioribus militibus singulorum comitatum, ad Regem Londini, in octavis predictis in forma supradicta. Item in forma predicta scribitur civibus Lincoln, et ceteris Burgis Anglie, quod mittant in forma predicta duos ex discretioribus tam civibus quam burgensibus suis. Item mandatum est baronibus de probis hominibus quinq[ue] portuum, quod mittant*

*quatuor de legalioribus et discretioribus*," etc. The text of the writs addressed to the sheriffs and towns has indeed not been preserved to us, but probably nearly agrees with those addressed to the Cinque ports. "*Ita quod sint ibi in octavis predictis nobiscum et cum prælatis et magnatibus regni tractaturi et super præmissis auxilium impensuri*," etc. With this act a form of summoning the *communitates regni* originates with the following innovations:—

(i.) Not only were representatives of the lesser Crown vassals convened, but the shires and a number of towns as such, were represented by two members of the body of the community of the shire and the citizens.

(ii.) These representatives were directly convened to deal with the business of the nation; no longer as formerly, merely for the military levies, or for peace negotiations, or for particular judicial and administrative purposes.

This is therefore the act which originated the later Lower House. The majority of the older historians of the Constitution have rightly recognized this; as, for instance, Spelman, in his "*Glossarium*," under the word "*Parliamentum*," and again in his special treatise on Parliaments. The same result is deducible from the reprint of the Parliamentary writs by Prynne (1659–1664), and from Dugdale's "*Summons*," but principally from the Peers' Reports on the dignity of a Peer, vols. i. and v. Among more recent treatises, this has also been acknowledged as a safe deduction by Hallam ("*Middle Ages*"), and Parry ("*Parliaments*," xii.). The summons of 1265, however, does not as yet show how far the convocation of the shires and cities was constitutionally necessary for the publication of decrees and the deliberation upon subsidies. The circumstances attending the convention were of such an extraordinary kind, that the necessity of a repetition did not as yet result from them. It was with such councils almost as with Henry the Second's assembly of notables; they cease again, simply owing to the fact that the King no longer summons such extraordinary assemblies. After the overthrow of Simon de Montfort and his party, all that we hear of is the restoration of the ancient constitution and national rights. The further *concordia* held by Henry III. are summoned in the ordinary way by per-

sonal writs addressed to a number of prelates and magnates; only from these councils the later money-grants proceed; only from them the statutes of Marlebridge. The event of 1265 was of moment in the same way as the Assizes of Clarendon and North-

ampton a hundred years before; the lesser vassals and the freeholders had for the first time been combined into a body, and had the consciousness that to them belonged under certain circumstances a share in the King's council.

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## CHAPTER XX.

### *The Class-relations of the Anglo-Norman Period.*

At the close of this period we must summarize from all the conditions, which we have hitherto traced in detail, the influence of the feudal system upon the formation of the Anglo-Norman estates. After the close of the first century from the Norman Conquest, the law work of Glanvill displays to us the English feudal law complete in its technical development. The "*Liber Niger*" (edit. Hearne) gives a sketch of the greater feudal estates in the same period, while the collection of Testa de Nevill (edit. 1807) furnishes one for the close of the period.

At the beginning of the period the Norman Crown vassals evidently regarded themselves as a ruling class; the sub-vassals were looked upon almost as a middle class, the rest of the population as vulgar *rôturiers*, as nearly as possible like the class liable to the "*taille*" in France. The feudal system, by blending office and property, and by turning all relations of dependence into those of service, had everywhere the tendency to create an hereditary ruling-class and an hereditary serving-class. In England it was the power of the monarchy which checked this process of development. The royal power was here strong enough to keep the spiritual and the temporal power, the military and civil departments, and the personal right of honour, as well as the hereditary right of property, within their fixed and proper limits, to make every higher right in the State, dependent upon higher performances for the State, and not to allow the nobility and knighthood to become an aristocracy of birth, but to keep them upon the level of a "class-right." The imperfect development of estate privileges is decidedly the strong side of these institutions; and one which rendered the formation of a vigorous parliamentary constitution possible in the next period.

Through the power of the monarchy, in England, the combination of property with State duties and with political rights was guided into grooves different from those on the Continent, and formed the following degrees:—

I. *The Class of the Greater Vassals*, which is subject to the greatest change, embraced in its original distribution after the Conquest those men, who had already on the Continent enjoyed the rank of count, or who had brought whole divisions to the army. The estates of the twenty greatest feudaries in Domesday Book contain, according to the ordinary computation; 798, 439, 442, 298, 280, 222, 171, 164, 132, 130, 123, 119, 118, 107, 81, 47, 46, and 33 knights' fees with various appurtenances. In an analogous position with regard to property were the bishops and many abbots. If the comparative smallness of the knights' fees be borne in mind, and the constant diminution of the lordships by subinfeudation, it will be seen that they were originally much smaller than the duchies and earldoms of the Continent. Of still greater importance was their want of compactness, which dated from the Anglo-Saxon period, the possessions of the four greatest feudatories being scattered throughout from six to twenty-one counties. Between these lay the royal demesnes and the estates of lesser vassals in all the counties. The landowners accordingly could not consolidate themselves, for the strict law of escheat on failure of an heir to the fee, or confiscations, would often bring back the same estate to the Crown several times in a single century. The great feudatories of the time of the Conquest are all found during the first century among the rebellious vassals. The three greatest grants were recalled by the Conqueror himself. As a rule, however, the older lordships remained intact, and were referred to in the Exchequer as extraordinary fees under the name of "capital honours." Their sub-vassals who were scattered throughout the counties were summoned by the royal *Viccomes*. The formation of a compact military power was thus actually and legally hindered by the prohibition of private fortresses, and by the oath of allegiance paid by the sub-vassals to the King. The same impediments checked the power of forming great feudal courts, which became in later times more and more confined, owing to the system of itinerant justices and the permanent central tribunals, and was further diminished at each successive re-grant. The Norman Period was certainly not deficient in external splendour. Many a manorial household formed a small court with the ancient court offices, which were sometimes even hereditary. Many lords are described as being owners of parks; certain of them, with royal permission, possessed a fortified castle. In the

charters addressed to their men and tenants, they made use of the style of the royal charters: "*Dapifero meo et omnibus hominibus meis, tam Francie quam Anglie.*" But with all this splendour there was no solid foundation, and most especially the support found in faithful vassals was lacking. After all, the eminent position of these lords was more an actual than a legal one. The *barones majores*, indeed, appeared in the military array as bannerets; their reliefs, wardships, and marriages form the principal items in the Exchequer (*Dialogus de Scacc.*, ii. c. 10), and in the rating of the *relevia* and amerancements, they had the undesired honour of a higher scale. As a matter of course at the royal assizes, the *barones majores*, being summoned to court by name, were put before the squireless knights. But if in spite of these things, no hereditary dynastic families arise in England, and the position of the great vassals remains based merely upon class-rights and privileges, as in the Anglo-Saxon period, when the great Thane, as such, has no greater *Weregelt* than the county Thane, it is due to the conjunction of the following circumstances:—

(i.) Firstly, to the difference in origin, because in England the lord's position was not founded upon Seigneuralty (that is, the transference of military service from the small to the great landed estates), but upon the police protection of the *Hlāford*. Besides this the monarchy did not allow any extension of the manorial, judicial, and police powers to arise, and no privileged right to a court of peers, and no exception to military service; but by the assize of arms it rather raised to a living military institution that popular array which in the northern counties had always remained able to take the field. The haughty bearing of the martial classes against free civilians found therein an effectual barrier.

(ii.) It was also due to a difference in its development. After the reign of Henry I. the great bishop, Roger of Salisbury, whose family for a hundred years occupies so eminent a position in the administration of the realm, is to be regarded in some measure as the founder of a new official nobility, the distinguished members of which not only find their way into the bishops' sees, but also, by grant of manors and by marriage, into the great nobility, such as the Bassets, Clintons, Trussebuts, etc. At the close of every two generations of this period the larger portion of the greater baronies appear to have passed into the possession of other families. As early as the commencement of the twelfth century the great nobles of the conquering army were, in consequence of their unsuccessful rebellion against the monarchy, dispossessed of their original estates. Under Henry II. the newer official

nobility already forms the majority of the body of great barons, whose descendants take the lead among the barons of Magna Charta. Other families again appear in the foreground of the barons' war. The English prelates also are not local rulers, after the manner of the French and German electors and bishops, but an official nobility, which conducts the great business of the nation in common with the secular official nobility, and on that account with all the more uniformity.

(iii.) The striving after an hereditary position for the ruling class accordingly, in England, takes a direction not towards the foundation of independent local lordships, but towards a participation in the supreme council of the Crown. This personal vocation must, according to the nature of the case, be confined to the firstborn alone. In the same manner the heavy burdening with military service and taxation leads to a limitation of the privilege to the firstborn, and thus lays the foundation of the hereditary peerage, which arises in the following epochs. (1)

II. *The Second Class* was formed by the lesser Crown vassals, gradually blending with the sub-vassals. (2)

(1) On the formation of the class of the higher nobility, and subsequently of the knighthood, I may be permitted to refer my readers to my treatise, "*Adel und Ritterschaft in England*" (Berlin, 1853, 8vo.), upon which, however, the authorities of Hallam and Allen, and the older ones of Selden and Dugdale, have here and there had too great an influence. As to the first distribution of landed property by the Conqueror, cf. above, pp. 124-128 (Ellis, "Introduction," i. 226 *seq.*). The manner in which the estates of the magnates were mingled together, is shown by the following survey of the number of hides (*hide*) in Sussex, in which county the manorial possessions are especially numerously represented: Earl Roger, 818 manors; William of Warenne, 620; Earl Moreton, 520; William of Braiose, 452; the Archbishop of Canterbury, 214; Earl Oro, 196; the Bishop of Chichester, 184; Bishop Osbern, 149; the Abbot of Fecamp, 135; Battle Church, 60; the King, 59; the Abbot of St. Peter, 39; the Abbot of St. Edward, 21; Odo and Eldred, 10; the Abbot of Westminster, 7. As to the supposed estates of earls, *barones majores*, and *minores* of this period, cf. above, p. 288.

(2) The formation of the English knighthood is in its final result described in the *Testa de Nevill* sive

*Liber Feodorum in curia Beccarii tempore Henry III. and Edward I.* (1 vol., folio, 1807), (Record Commission). The enumeration of all the small Crown-fiefs, the tenures by frankalmoign, and the amount of the *scutagia* and *auxilia* paid by each Crown vassal prove to us, that upon the foundation of possessions like these, no separate class could be built up; indeed, the lesser Crown vassals were sure to lose themselves in the mass of the sub-vassals, who frequently possessed two, three, four, and more knights' fees, and in whom the old Saxon Thanehood was also represented. How doubtful in many points the line of demarcation was, is shown by the county of York, where, of one hundred and five Crown vassals, only twenty-nine are large land-owners; the rest were as a rule described as Thanes of the King, whilst they are only in possession of desolated lands, which at the time of Domesday Book could not possibly perform a knights' service. The word "*miles*" sometimes designates a simple horseman, and sometimes an important possessor of great knights' fees. Even this use of the term expresses that the tenures of property and the performances in the commonwealth are each considered separately, and that accordingly no separate class-relations are in existence, arising from the blending of

The lesser Crown vassals differ in no way from the greater in respect of their tenure. They are directly enfeoffed of the King, and are competent to sit in judgment upon every Crown vassal, as *pares* of the *Curia Regis*, so soon as they are summoned to it. Many of them find, in influential offices, a position which is outwardly also equal to that enjoyed by the great vassals. Of the original number of about four hundred *barones minores*, the majority were probably from the first owners of knights' fees in Normandy, or younger brothers and sons of such possessors; and the rest the holders of small court-offices, as the under-chamberlain Herbert, the four cooks, the carpenter, the bow-stringer, the forester, the falconer, the steward, the porter. Only in a few cases do the names, like Oswald, Ealred, Grimbald, Eadgar, Eadmund, and Ællured, indicate Saxons.

Of the great number of the *sub-tenentes* (7871) in Domesday Book apparently less than half are really subinfeudated sub-vassals; they are for the most part Saxon Thanes, and free followers doing service, among whom formal subinfeudation made only slow progress (above, p. 126). So far as such investiture took place, the possessions of the ecclesiastical mesne tenures seem to be on the average somewhat greater than those of the secular tenants. The sub-vassals, who had themselves received more than a knight's fee, might also themselves have *sub-tenentes* under them. The majority of the Norman sub-vassals were probably at the Conquest the dependents of the greater feodaries, younger brothers or sons, servants, soldiers, or other people who had been till then landless. About half of them, as far as can be judged from the names, were Saxon Thanes who kept their old possessions—and who had become, very much against their will, subject to Norman lords.

In respect of the amount of their landed property, the two classes appear from the first equal. Their feudal possessions were comprised in the soil with its customary rights. Upon the estate, endowed with manorial rights, the landowner raises through his bailiffs (*præpositi*, *reeves*, *stewards*) the customary dues; and being generally represented by them, holds

personal rights and duties with possession. The *homagium*, too, does not express such rights. It is an established fact, that an oath of allegiance can be taken to a private individual for a fief and the grant of an estate in return for service; without them, certainly only to the King (Bracton, ii. c. 35, sec. 6). It is, moreover, useless to try to import from the Continent into England, a technical distinction between *homagium*

*ligium* and *stipulium*. The *ligium* means the feudal oath generally (Glanvill, ix. c. 1; Bracton, ii. c. 35, 37; Fleta, iii. c. 16, sec. 16; Britton, c. 68). The honour of serving the King belongs in the first place to the greater land-owners, and is therefore considered all the greater honour for the lesser land-owners. To be a "liege subject of His Majesty" is still regarded by the Englishman of the present day as an honour.



his court in the forms of the court baron and customary court, and by virtue of later grant a royal local magisterial court or court-leet. But the possession of a manor is independent of a military enfeoffment, and we even meet with manors in the possession of *socmanni*. In like manner the position of a law-man (*liber et legalis homo*) is independent of a knight's fee.

The uniform pressure which the royal power exercised upon the greatest as upon the least of the vassals, was sure in this state of things to make all the lesser vassals appear more and more as one homogeneous body. Since subinfeudation was the only form of independent disposition of fiefs, in numerous cases Crown vassals became, in respect of newly acquired property, under-vassals; even the great feudatories and prelates did not disdain to hold a fief by under-tenure of other lords and of the Church. The methods of holding property became thus so complicated, especially after the Crusades, that all idea of a lower rank as attaching to subinfeudation disappeared.

The development of the chivalrous fraternities had made the dignity of knighthood a common bond of union for all vassals. Education, profession, martial honour, and participation in the county assemblies, are the same for the whole host of the lesser vassals. Every honorary precedence of the lesser Crown vassals over the sub-vassals became more and more problematical when in re-grants of manors the Crown changed the mesne vassals into immediate vassals, and with the sanction of the King new holders entered upon the small Crown fees.

And when at last the statute of *Quia Emptores* (18 Edw. I.) entirely prohibited new subinfeudations, in order to put an end to the interminable complications in the tenure, when every new possessor became from thenceforth the immediate vassal of the lord paramount, it would have been absurd to concede to the lesser Crown vassals, as such, the right of taking precedence of the old sub-vassals, who had been established for generations upon their old landed estates. From the time of Henry II., moreover, the decisive innovation had arisen of a money payment being more and more regularly substituted for personal military service; there was also no further difference in this respect between the two tenures than that the lesser baron paid his scutage to the sheriff, and the sub-vassal sometimes to his lord's officer, and sometimes to the sheriff.

A comparison with the state of things on the Continent proves to us that the main point of distinction in England was the *alienability* and *divisibility* of the knights' fees, the inalienability of which was the chief basis of the lesser con-

tinental nobility. In England it was impossible to maintain the inalienability of the fees, for the very reason that the feudal bond had become extended to the whole of the landed possessions in the country; alienability was even promoted by the fiscal maxims of the Exchequer, to which every solvent holder was equally agreeable, as well as by the ease with which the royal consent could be obtained for all sorts of matters on payment of fees. The period of the Crusades, for instance, was productive of numerous and extensive alienations, mortgages, and partitions. After the acquittance of feudal service by scutages, feoffments and subinfeudations appeared altogether only as an onerous method of alienation, through which the new holder took over with the land, the pecuniary burdens of *relevia*, the payment of the periodical *auxilia*, and the restraints attached to feudal wardship, marriages, etc. The alienation carried with it also the creation of new incidental ground rents, which urgently required that the legislature should bring about a simplification of the law of tenure. Hand in hand with this went the splitting up of their land into parcels by the feudal possessors; which was intimately connected with the frequent change of possession, and with the circumstance that the judicial power failed to firmly consolidate itself with the landed interest. Presently the Crown resolved on a re-grant in parcels in cases of escheats and forfeitures; then again allowed a partition among several co-heirs; and finally alienations even of portions of a fief on payment of heavy fees, so that even hundredth parts of a knight's fee are met with. Hence as early as the middle of this period the number of the possessors of the smaller fiefs visibly increased. Many of them are younger scions of the families of the Crown vassals and sub-vassals; others again freeholders who had been enfeoffed for their military services, or through an act of favour; others were wealthy persons, especially those in the towns, who at the time of Richard I. acquired by enfeoffment such lands as were generally sold to the highest bidder.

The combination of these circumstances in England in the Middle Ages, did not permit of the knighthood becoming an exclusive hereditary dignity. Not real estate as such, but the mastership acquired in doing warrior's service gave a claim to the honorary title of *dominus*, or "sir," which remains a personal dignity that the Crown vassals were bound to take up. This honorary title is also conferred in the Middle Ages upon the higher clergy and graduates of the universities. The word "knight" is used to denote more specially the military rank with it, but since no especial social rights are connected with it, and the rights of possession and influence in the shire,

etc., did not depend upon it, the taking up of the dignity of knighthood was in comparatively early times felt rather as a burden, in consequence of the high fees chargeable, and was from time to time enjoined by royal command. Already in these times the Exchequer rolls contained innumerable entries of fees which were paid for a delay (*pro respectu militias*). Those possessors of knights' fees who had not acquired the formal dignity of knight now call themselves esquires (*scutarii*). In their shire, the esquire and knight were sufficiently known by their position in the county court. On the other hand, since the Crusades, the adoption of family arms had become more and more an established custom, which in the military array had been rendered necessary by the wearing of armour.

The main issue, the sum total of services to be rendered to the State, became finally the same for all; the knighthood at the close of this period forms an entirety—a freed and definite station, in which no contrast between noble and burghess landowners ever arose, and without prejudice to the social claims to superior honour advanced by old possessors and families.

III. The mass of the rest of the ~~freeholders~~ and tenants appeared from the standpoint of the Norman knighthood as "*taillables*," a kind of "appurtenance of the soil." The royal assurances after the Conquest contained indeed in general a guarantee for the protection of all existing rights of property. But the mass of the ceorls (*villani*) were still further pressed down by Norman arrogance, as well as by the form of the local police regulations during this period, so that they were with regard to the landowner, in a precarious position, and without a right of possession protected by law. As against the lowest stratum of the people the monarchy allowed the propertied class full sway, just as it had upon the Continent created a "bondmen" peasantry. Moreover, in the Exchequer there was that "*pensée immuable*," which knew full well that the enormous money payments which fiefs had to render to the Crown, must after all be raised through the peasants, and ultimately fell upon them.

Better possessory rights on the other hand were given in Domesday Book, under the headings of *liberi homines*, *socmanni*, *burgenses*. Many among these were old allodial possessors, who became more uniformly subjected to the burdens of the feudal system, the more the principle was carried out that this kind of possession also could be maintained by "redemption," that the inferior possessor must bear the burdens of the vassals, and the Saxon those of the Norman. The extension of feudal principles to it, is evidently the result of an increasing practice, which originating from the Ex-

chequer and the *Curia Regis*, was at last embodied in the universal maxim that "all landed property in the country" is held of the King, either immediately, or mediately through a mesne lord. The legal details of these relations with regard to private rights will probably never be completely explained.<sup>(3)</sup>

But with regard to public law the following circumstances intervene and lead to a gradual amelioration of their position.

1. The revival of the county militia after Henry II.'s *assisa de armis*. Even in the feudal militia the military service of such persons had certainly been customary and indispensable as a reserve. Those thus equipped (*servientes*) however appear there only as servants of their lords; whilst the *assisa de armis* summons them as a national levy of their own duty, i.e. of their own right.

2. The constitution of the civil courts had allowed all *libere tenentes* to continue to act as lawmen in the hundred court, which was now certainly in a state of decay. With the beginnings of the jury system their participation became extended. In commissions appointed to take evidence, whose province became more and more only to establish facts, a participation of credible inhabitants of the neighbourhood was requisite. In addition to the knights, other *libere tenentes* were accordingly regularly appointed, but they were not to be mere *villani* or *rustici*.

3. The criminal jurisdiction and police control of the *turnus Vicecomitis* drew to it the whole of the adult population, to give account of the preservation of the peace and to pass an

(3) The common law relations subsisting between freeholders, tenants, and villeins, can only be perceived in some degree from the law books, and considerable gaps are left in the history of their development after the later Anglo-Saxon era. For the period immediately following the Conquest, the list given above (p. 128), taken from Domesday Book, serves as a source of information. The *liberi homines* (*ad nullam firmam pertinentes*) who now and then occur, are probably old allodial peasants against whom at first no claim could be made, and who were only gradually bent down under the judicial and financial practice of the feudal system. *Liberi homines* appear in considerable numbers only in the counties of Leicester, Lincoln, Norfolk, and Suffolk; *liberi homines commendati* occur principally upon ecclesiastical estates. The "Dialogus" shows the light in which bureaucratic opinion

held the villeins: "*decretum est, ut quod a dominis exigentibus meritis interveniente pactione legitima poterant obtinere, illis inviolabili jure concederetur; ceterum autem nomine successione a temporibus subactæ gentis nihil vindicarant, de cetero studere tenentur devotis obsequiis Dominorum suorum gratiam emercari,*" etc. (Dial. de Scaco, i. c. 10). In the law works of Glanvill and Bracton the increasing pressure upon the *villani* appears to have reached such a pitch that former villeins and those who had been free possessors from their birth, are comprised under the common expression *villanagium* (Ellis, i. 81). From that time they form the "villeins regardant" in contrast to the landless "villeins in gross" (the remnant of old serfdom). Here also oppression and denial of justice was undoubtedly the source of peasant-subjection.

annual magisterial review, i.e. "view of franc-pledge." In spite of much that was burdensome in it, it gave rise to a useful habit of common service for the whole people. In the local police tribunals, which had become so numerous subdivided, and which regulated their proceedings according to the pattern of the *turnus Vicecomitis*, the dearth of freeholders caused the *villani* to be constantly employed in actual service as lawmen.

4. In a still greater degree, and systematically, did this become the custom in the courts leet of the towns, in which a considerable burden of taxation was evenly distributed and thus produced the idea of a civic equality. The various ranks and descriptions of property here become inseparably blended together. The sum total of all those who bore scot and lot, are now described as "*liberi homines*" or "freemen," as men fully bound by duty, and fully entitled to their rights. The towns become the nucleus of a new class-formation, framed on the old relations subsisting between *liberi homines*, *socmanni*, and *villani*.

In the whole picture of these class relations there are found in spite of all the pressure exercised by a fiscal and police régime, important germs for future times. However modest the measure of political privileges which these shire and city unions were primarily to gain, the most important foundation of a parliamentary constitution had been already laid; which was, the habitual and personal meeting together for public business, the local and periodical co-operation of the State-bureaucracy with the individual communities.

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## THIRD PERIOD.

THE PERIOD OF THE GROWTH OF  
THE ESTATES OF THE REALM.

## CHAPTER XXI.

The Century of organizing Statutes — The Union of the  
Central Government with the Constitution of the Counties.\*

EDWARD I., 1272-1307  
EDWARD II., 1307-1327  
EDWARD III., 1327-1377  
RICHARD II., 1377-1399  
HENRY IV., 1399-1413

HENRY V., 1413-1422  
HENRY VI., 1422-1461  
EDWARD IV., 1461-1483  
EDWARD V., 1483  
RICHARD III., 1483-1485

ALMOST three generations had passed away since the last year of Henry II.'s reign, and the land had not yet found rest. John's reign had left behind it the indelible impression that even the Great Charter did not as yet afford sufficient protection to person and property against a despotic form of government. Furthermore, it had become evident that nobles and prelates alone were not equal to the new task; Magna Charta had at first only engendered party struggles. Accordingly, during the vicissitudes of Henry III.'s reign both

\* Among the sources and works of reference for this period we must place before all others the State records, and particularly the Statute Rolls which exist as the official publication of the Parliamentary legislation of permanent validity from 6 Edward I. to 8 Edward IV., and which are the basis of the official collection of Statutes of the Realm (1810, etc.). As the next source are to be considered the Parliamentary Rolls, that is, registrations made by the officials of the Chancery of the more important proceedings in Parliament, now printed as "*Rotuli Parliamentorum ut et Petitiones et Placita in Parlamento*" (vol. i.-vi. 1832, fol.).

The proceedings of the Continual Council are printed in Sir H. Nicolas,

"Proceedings and Ordinances of the Privy Council of England from 10 Richard II. to 33 Henry VIII." (7 vols. 8vo, 1834-1837); see also the Monograph of Sir F. Palgrave, "An Essay upon the Authority of the King's Council" (1 vol. 8vo, 1834). As to the Exchequer, Madox gives information for this period. As to the judicial system, see Foss, "The Judges of England" (1848-64, vols. iii., iv.). The general collection of the State records, Rymer, "*Fœdera, Conventiones*," etc. extends to 1391.

Of the law books, Britton and Fleta belong to the commencement of this period, as does also Horne's "*Myrrour aux Justices*," (cf. Biener, "*Engl. Geschw. Ger.*," ii. 387, seq.). The

parties involuntarily resorted to the same measure, to give stability and equilibrium to the nascent constitution, by admitting the middle classes in groups distributed according to communities.

By the side of the great feudatories, whose participation in the government of the realm had since the days of Henry III. been immutably established, a middle class had sprung into prominence in the knighthood, owing to the improved position of the sub-vassals and the wealthy freeholders. Their position in the county court, their homes, and their family connections had given the knighthood a solid influence in the towns also, in which likewise a new middle class, but one still inferior to the knighthood, had sprung up from other sources. The monarchy had to make up its mind to give these middle classes a share in the government of the realm, if it did not mean, in its struggles with the magnates, to part with its influence to the committees of the barons, as had been the case under the inglorious reign of Henry III. The experience of the Provisions of Oxford and of the Barons' War were of paramount influence upon these times. With Magna Charta and the manifold limitations it imposed upon the administration of the realm, with the great concessions made to the Church, and the growing power of the knighthood and the boroughs, a government such as the kings of England had formerly carried on by an Exchequer and a number of confidential counsellors, was no longer possible.

The firm establishment of these conditions became the task of the times throughout a series of statutes, beginning with Edward I. the greatest monarch England had seen since Ælfred the Great, and the one whose rule constitutes the most glorious epoch of the Plantagenets. The bitter experiences of his father had taught him that a participation of the estates in the Government could not be refused. Firm and shrewd of character, he resolved to give new strength and stability to the throne by means of those very institutions which had proved ruinous to his predecessor. With the statute of Marlebridge a legislation was begun which now made such progress, that at no other time throughout the Middle Ages was so much law positively established as in the century of the three Edwards. For this legislation no object

best authority upon the practice of the courts are the so-called Year Books, that is, the collection of cases forming precedent determined in the central courts, from Edward II. Of legal history, Reeves, "Hist. of the English Law," vols. ii. and iii., deals with the period. Of the treatises upon the Con-

stitutional History of England, Hallam, "Middle Ages," cap. viii. and the supplements to it; Lappenberg-Pauli, "Geschichte Englands," vols. iv., v., but above all, Stubbs, "Constitutional History" (1874, etc. vols. ii. and iii.), whose chief merit and main success lies in this period.

appeared too great, and none too small. Lord Chief Justice Hale states emphatically that in the first thirteen years of Edward's reign, English law made more progress than in all the centuries from that time until his own day.\*\*

The greatness and the peculiarity of this legislation lies in the constant realization of a single fundamental idea; the combination of all the functions of the secular executive power with the existing greater unions of communities—a combination by which the people became penetrated with the consciousness of its political duties, inspired with an idea of political unity, and competent to take the preservation of peace and order in their own hands. In this profound system of legislation, as also in Magna Charta, could be perceived the hand of that well schooled bureaucracy which from the close of Henry the Third's reign resumed its normal activity, and continued the internal consolidation of the constitution, under the guidance of a high-minded monarch, and which (in spite of a cessation under Edward II.) finally accomplished under Edward III. the building, in the course of a single century, of the new edifice from the heterogeneous materials at hand.

The necessary cohesion of the counties, hundreds, and boroughs, was already existing, thanks to the retention of the Anglo-Saxon judicial system, to the now perfect reconciliation of national contrasts, and to the opportune transformation of the *judicium parium* into the jury system. The country was indebted to the harsh rule of the Norman period for one great result, viz. the habit of the wealthy classes of being eager and ready to perform the behests of the State in military, judicial, and police functions.

\*\* Of the fertility of the legislation during this period, the following abbreviated list of the reign of Edward I. may give us a survey: 3 Edw. I., Stat. Westminter 1; 4 Edw. I., Stat. de extenta Manerii; Stat. de officio Coronatoris; 6 Edw. I., Stat. of Gloucester; 7 Edw. I., Stat. dealing with alienations in Mortmain; 10 Edw. I., Stat. of Rutland; 11 Edw. I., Stat. de Mercatoribus; 13 Edw. I., Stat. Westminter 2, Stat. of Winton, Stat. Civitatis Londini, Stat. Circumspectas Agatis, Confirmatio Chartarum; 14 Edw. I., Stat. Exonise; 18 Edw. I., Stat. Quia Emptores (Westminter 3), Stat. de Judaisimo, Stat. Quo Warranto, Stat. Modus levandi fines; 20 Edw. I., Stat. of Waste, Stat. de Defensione Juris, Stat. de Moneta; 21 Edw. I., Stat. de iis qui ponendi sunt in Assisis, Stat. de Malefactoribus in Parois; 25 Edw. I., Stat. Confirmationis Chartarum; 27 Edw. I., Stat.

de finibus levatis, de libertatibus, perquirendis, Stat. de Falsa Moneta; 28 Edw. I., Stat. dealing with wardship and reliefs, Stat. dealing with accused persons, Stat. Articuli super Chartas; 29 Edw. I., Stat. amoveas manum; 33 Edw. I., Stat. de Protectionibus, Ordinatio forestarum, Stat. dealing with measurement of land, ord. of Inquests; 34 Edw. I., Stat. de Conjunctione Feoffatis, Stat. on Amortization, ordo Forestarum; 35 Edw. I., Stat. de Asportatis Religiosorum, and so on to a still greater extent under Edw. III. This stupendous stream of legislation may be explained also by the circumstance that the half century of the incapable government of Henry III. had piled up in all directions the demands made upon the legislature. The merits of Edward I. are also fully acknowledged by Blackstone, iv. 425-427.



The essential unity and power of the executive also existed, thanks to the strong development of the royal sovereign rights, to the strict management of the Exchequer, to the judicial bench of the *Curia Regis*, and to the elements of a council of State, which had been rising into prominence from the time of Henry III.

The fault lay only in the insufficient combination of the two elements, for which neither the officialist system of Shirgerêfas and local bailiffs, nor the itinerant commissions sufficed; because such institutions in the hands of a despotic government became the passive tools of oppression, and under a rule of *grandeess* were converted into mere unstable and violent party instruments.

This gap had been filled up in the former period by committees of parishes, so far as temporary needs required; that is, when the royal officer, who stood aloof from the people, could not determine questions of fact and local questions, except on the testimony of the neighbours on oath, *i.e.* by means of the provost and four men of the villages, and by the representative body of twelve men or more from the greater unions. In this way the framing of Domesday Book had been brought about; in this way from time to time an establishment of inquests of office (*ad quod damnum*, etc.); the police functions of the court leet; the new method of determining the question at issue in civil actions, and the question of guilt in criminal cases; the ratings for military service, and the first ratings for the hide-impost and income-tax. What was now to be achieved was the permanent and uniform blending together of these elements so as to form an organic union of the central government with the government of provinces, districts, and towns—such an organic union as in our own time forms the problem which the German Empire has to solve. The essentials were—

1. That the rules of administrative law should be as clearly defined as possible, seeing that the fundamental articles of Magna Charta did not as yet suffice for securing a fixed administrative rule, and for the protection of the subjects.

2. The formation of the system of juries into permanent, uniform, and organized institutions of justice, and of military, civil, and financial administration.

3. The development of the higher and lower district offices (justices of the peace, coroners, constables, etc.), for all such dispositions and measures of the executive as could not be performed by the juries, but only adequately by individual officers.

In this manner the organic union of the English Government with the counties, hundreds, and boroughs was brought about; so that the exercise of the undiminished prerogative

rights passed by virtue of legal authority to the officers and committees of the provincial unions. Thus arises the world-renowned system of English self-government, the independent elements of which had existed already in the former period.\*\*\*

I. *A blending of the military system with the constitution of the shires*, to form an organized militia (originating in the reign of Henry III.) during this period became necessary, both for the national defence, and on account of the military power of the barons within the realm. The personal liability of the owners of knights' fees to serve, still formed the basis of the ordinary military system; but the feudal roll had already shrunk considerably. The growing opposition of the clergy had greatly restricted the feudal services of the clerical crown vassals. The administrative maxims of the Exchequer had, in the case of re-grants of land, rather aimed at acquiring great revenues than at the permanent interests of national safety; many groups of estates were granted under the names of "baronies," for the purpose of raising the great *relievum* of a hundred marks, whilst the number of the shields was reduced. The dividing up of knights' fees into parcels rendered impracticable the furnishing of troops for real purposes of war; frequent alienations brought the system of holdings entirely into disorder. In all directions the insular position of the country showed its influence. The military conditions existing on the Continent, the hundreds of baronies and fortified towns all competent to wage private warfare, the countless castles, the short campaigns and petty sieges were not to be found in England. The few castles and fortified towns were as a rule in the hand or under the control of the King. Hence had resulted a state of affairs, in which the summons of the feudal militia only appears as a mastering. The owners of the knights' estates pursue, each according to his inclination, either agriculture, or military service for pay, or again the highly esteemed State service. A standing feudal

\*\*\* The complicated details are given more exhaustively in my "*Geschichte des Self-government*," 1863, pp. 144-204. The modern English historians appear inclined to accept this conception of the development of their constitution. Thus Stubbs, "The principle of amalgamating the two laws and nationalities by super-imposing the better consolidated Norman superstructure on the better consolidated English substructure, runs through the whole policy. The English system was strong in the cohesion of its lower organism, the association of individuals

in the township, in the hundred, and in the shire. The Norman system was strong in its higher ranges, in the close relation to the Crown of the tenants in chief whom the King had enriched" (Stubbs, i. 278). "The peculiar line of Edward's reforms, the ever perceptible intention of placing each member of the body politic in direct and immediate relation with the royal power, in justice, in war, and in taxation, seems to reach its fulfilment in the creation of the *Parliament of 1295*" (Stubbs, ii. 292).

militia only appeared essential for the border lands, which accordingly retained a different military organization. Hence as early as the time of Henry II., the system of the purchase of immunity by scutages had begun. This purchase of discharge becomes gradually the rule; after Edward II. the scutage becomes absorbed in the general ground-tax. A complement was now found in the county militia, in the form in which the Assize of Arms (1181), had remodelled it, but which had not as yet attained to its full effectiveness. It now receives an elaborate code of organization. With the consent of Parliament the statute of Winchester, 18 Edward I. c. 6, declares the *liberi homines* who were capable of bearing arms liable to serve in the militia and bear arms from their fifteenth to their sixtieth year. In like manner as in the constitution of the Roman centuries, five degrees were formed of incomes of 15, 10, 5, 2-5, and under 2 pounds of silver. Every possessor of lands of an annual value of £15 or 40 marks in money was to provide himself with a breast-plate, an iron helmet, a sword, dagger, and horse; of £10 to £15 the same, except the horse; those possessing £5 to £10 in land, a quilted doublet, an iron helmet, a sword and dagger; those with 40s. to 100s., a sword, bow and arrows, and dagger; those worth less than 40s. in land, a sabre, pike, and small weapons; those of less than 20 marks in personal property, similar weapons. By this rating according to money value, the possessors of knights' fees, citizens, free tenants in villenage, and householders, are ranked together in degrees; the wealthy freemen of the boroughs also, without regard to landed estates. At the same time the more special provisions of the Assize of Arms (Henry II.) continue in force; the King, by virtue of these provisions, causes those bound to serve to be registered and taxed by his commissioners, and the disobedient to be punished. In every hundred a chief constable is appointed; in the old tithings and *villatæ*, the village bailiff is generally made a petty constable, and receives in addition to his old magisterial functions, a new military office. An inspection of the troops ("view of armour") is to take place twice a year. In the interests of the general peace the militia stood at all times under the orders of the sheriff. When war threatened, however, the King sent a commission of men experienced in war to bring the militia of the district "into military discipline." The double relation that now existed, that of a claim of the Crown to feudal services arising from the feudal bond, and to the service of the national levy, by virtue of the militia code, was for a long time turned to account somewhat arbitrarily, in spite of the manifest unfairness of making claims upon the communities for equipping

and maintaining the soldiers, in addition to the heavy taxation of the boroughs and freeholders. Under Henry II. and Richard I. the militia burden was frequently reduced to this extent, that every two men bound to military service had to equip and maintain a third, or every three a fourth, or every eight a ninth man. But the *régime* of the nobles at the beginning of Henry the Third's reign repeatedly demanded with less consideration a forty days' service at the expense of the townships, or of the county, or else the supply of munitions of war and provisions. Under Edward I. and Edward II. these equipments at private cost were frequently required. (1)

Against this system, but above all, against the employment of the national militia upon foreign service, a perfectly intelligible opposition at last arose. According to 1 Edward III., stat. 2, c. 5 and 7, no one shall be compelled to go beyond his shire, except when necessity and a sudden irruption of foreign foes into the realm require it. According to 25 Edward III., stat. 5, c. 8, no one shall be compelled to go beyond the realm under any circumstances whatever,—nor beyond his county, except in cases of urgent necessity,—without the consent of the Parliament. The regular service was thus restricted to the county, and to the purposes of national defence. All that went beyond this was dependent upon the sanction of Parliament. Both statutes were further confirmed by 4 Henry IV., c. 13; and especially the Commission of Array is so framed as to prevent the introduction into it of new penal clauses. After the statute of Edward III., the militiamen were, as a rule, maintained at the expense of the Crown, with the exception of the mere wars of defence waged

(1) An official report by Sir Robert Cotton contains a description of the methods of raising soldiers in this transitional period (cf. manuscript in the Cotton Library, Julius f. 6). Under Henry III. one man was to be furnished for every two acres of land, to do service for forty days, and at the public expense of the township (Dors. Claus. 14 Hen. III.). In the following year the men of the knights' fees down to twenty shillings yearly value were ordered to provide themselves with munitions and provisions for forty days at the expense of the county (Dors. Claus. 15 Hen. III. m. 8). In 27 Henry III. the like services were demanded for the campaign in Gascony (Rot. Vasc. 27 Hen. III.). In 1 Edward I., there was a levy of heavy-armed troops provisioned by the county. In 4 Edward I. one man and munitions for seven

weeks were required from each township. Under Edward II. there were repeated mobilizations *sumptibus propriis*. In 10 Edward III. a levy of knights takes place, and a definite number of horsemen were ordered from the counties with the option of a satisfaction in lieu thereof, according to a fixed scale. In 11 Edward III. a levy is made of feudal vassals and men of the boroughs and townships from their sixteenth to sixtieth year, the incompetent and aged to contribute to the expenses; the objections raised by Parliament were rejected. In 16 Edward III. every man possessing lands to the value of £5 is to furnish an archer for the King. In 20 Edward III. a levy is held of the towns and townships. In 24 and 25 Edward III. London furnishes three hundred archers.

against Scotland and Wales. After this there became manifested in the military department, as also in all the other departments of State, the gradual transition from specific performance into money payment, by the formation of a body of paid troops from select numbers of feudal and county militia. (a)

The constitution of an army for foreign service at this period was as follows. The mass of the horsemen was still made up of the feudal nobility and their followers, under the titles of barons, knights, esquires, and men-at-arms, among which last class were included all heavy-armed troops without distinction of rank. It was still the office of the marshal to arrange the heavy cavalry into equal squadrons (*constabulariæ*). The infantry, on the other hand, which was as a rule five to eight times as strong in numbers, formed companies of a hundred men each under constables or "*centenars*," and was divided into pikemen and billmen, and heavy and light archers. In the Welsh campaigns it appears that troops in uniform were already met with, and companies of labourers, miners, and gunners occur as new elements. After the parliamentary enactment of 25 Edward III., it was found more convenient to raise such troops partly by commissions for the enlistment of volunteers in the counties, and partly by contracts undertaking to supply them. The King contracted with an influential lord as *condottiere* for the supply of greater or smaller bands, at a daily rate for man, horse, equipment, and arms. The external decay of the feudal militia side by side with this new system does not imply that together with the feudal array the martial spirit and training of the great landowners had ceased. But a division of labour was introduced, according to which the duty of serving in the heavy cavalry was undertaken by preference by those who felt fitted for it, especially by younger sons, in return for pay. Altogether this division leads to the enhancement of the power of the great barons. Those of the lesser vassals and of the younger sons whose inclinations turned towards military service, marshalled themselves again

(a) At the commencement of Edward the First's reign the most unequivocal traces are found of the inefficient formation of the feudal militia, and of the king's embarrassments in consequence; e.g. in 5 Edward I. "Parl. Writs," 213. At the commencement of the reign of Edward II. a so-called *statutum de militibus* was published in the old fashion as an ordinance of the commander-in-chief, which was issued on the occasion of a parliament, and was enrolled by command of the King

(Reeves, ii. 288). The contents of the statute had, however, chiefly to do with the obligation to take up a knight-hood, and financial interests, and not the military discipline of the feudal militia. The chief progress made at this period lay in the development of the county militia. The constables of this militia occur apparently as early as Henry III.; the designation of "petty constables," for the provosts of the magisterial tithings is only customary from the time of Edward III.

in the form of a retinue round the petty courts of the earls and great barons. And here again were formed standing companies of sub-vassals and landless men of a chivalrous turn, skilled in the art of warfare, dressed in the colours and bearing the badges (liveries) of a landowner, and in which the *comitatus* of Tacitus revives in a new shape. The history of the French war shows us that the better tactics, mobility, discipline, and arming of these masses gained the day over the cumbrous feudal armies of France. The fact of the simultaneous existence of the feudal and the county militia enabled the strong features of the old and new system to be combined, and rendered it possible to select for the cavalry and infantry the most warlike and the most skilled elements. The retinues of the great barons served like standing *cadres*, not merely to keep the heavy cavalry in constant training, but also to perfect them in tactical manœuvring, so that in this direction also the English cavalry, in spite of its moderate numbers, was a match for the unwieldy masses of the French. (1<sup>b</sup>)

(1<sup>b</sup>) Compared with the decaying feudal system of the Continent, where the landlord, as such, still led his tenants (with all the defects which arose from the heterogeneous character of the companies, the difficulty of tactical disposition, and want of discipline), this system, blending the feudal militia and the national array, was decidedly to be preferred. On the Continent the deficiencies were counterbalanced by the fact that the enemy suffered also from the same faults. The still slow progress made by missile weapons produced in the arming of the troops a tendency towards strengthening the body-armour, which, in spite of all the experiences of the Crusades, remained always the same, and became at length a caricature. King James might well say in praise of armour that it not merely protected the wearer, but prevented him also from inflicting any injury on others. Yet an attack of horsemen against infantry was regarded as irresistible until the invention of the new tactical infantry arrangement. On the Continent this arrangement was first seen in the new system of the phalanx, in the glorious struggles of the Swiss against Austria and Burgundy. In England it was manifested in the formation of a light infantry, which, exercised to act in few lines, checked the onslaught of the cavalry for the moment by palisades, and through the more perfect construction

of their bows, by discharges thick as hail pierced the heavy armour with murderous effect, and then stormed with furious speed into the breaches they had made. When the two systems encountered each other in the great French wars, the English method showed its decided superiority. The contracts made with lords and knights as to furnishing soldiers are to be found in great numbers in the archives from Edward III. down to the close of this period (Grose, "Military Antiquities," vol. i. 71 *seq.*). As instances of the composition of such armies, I confine myself to the following: At the embarkation of 1346, there were 2500 knights and 30,000 followers and infantry soldiers (Villani, p. 943). At the siege of Calais, thirteen earls, forty-four barons and bannerets, 1046 knights, 4022 esquires, constables, and *centenarii*, 5104 *vincentarii* and mounted archers, 19,954 foot-soldiers and Welshmen ("Archæol. Brit.," vi. p. 213; Pauli, v. p. 657). At the levy under Henry V., a duke was to appear with fifty horses, an earl with twenty-five, a baron with sixteen, a knight with six, an esquire with four, a bowman with one horse (Rymer, p. 227 *seq.*). In the council protocols under Henry V. and VI., the constitution of the smaller detachments destined for field and garrison duty were altered as need required. In the cavalry the banneret received three shillings, the knight

At the close of this period the relation of the two systems of armaments had become reversed. The ordinary and uniform national defence is the county militia. The old feudal militia still consisted principally of the numerous followings (liveries) of the greater Crown vassals, that is, of very heterogeneous elements; but it was employed as an active force now only in the northern counties on the Scotch border. The necessary military stores had been since the time of Henry III. deposited in the Tower of London, under the charge of a *ballistarius*. In this period we meet with an *attiliator ballistarum* for military weapons and accoutrements, and a *galeator*, armourer, bowyer, and fletcher, who were subsequently united in the fifteenth century under the Master of the Ordnance.

II. The exercise of the judicial power becomes connected with the county in a new fashion by means of the now established system of jury-courts. At the close of the former period the three principles of the new judicial system had become applied, which now were raised to permanent fundamental laws:

*The separation of the administration of justice from the question of evidence;*

*The concentration of the administration of justice in the persons of learned judges appointed by the King;*

*The constitution of juries of the hundreds and counties, appointed by a royal officer, to determine the question of fact.*

The institutions of benches of judges, which, from the time of Henry III., appear somewhat more permanently filled, now become connected with the counties by deputations of their members. In civil proceedings the blending of the two was primarily caused by the complaints occasioned by a plurality of commissions of evidence at the central court. To redress the delays and expenses thus occasioned, Magna Charta had promised that the system should be reversed, and the justices of the realm were to come into the county—an arrangement which, however, proved hardly practicable in the method then pursued. This system was definitely

two shillings, the esquire twelve pence daily pay; the foot-soldier, the archers, carpenters, and other labourers sixpence and less. Here everywhere the foot-soldier appears treated separately, and the relation between the light-armed and heavy-armed, the horseman and the foot-soldier, was no longer that between master and servant, but between officer and soldier. A military summons in the writs of 9 Edward II. shows us that the number of the com-

batant Crown vassals, or, at all events, of those liable to be called out, amounted almost to 200. For individual contributions relating to the military organization of this period see further in N. Harris Nicholas, "The Siege of Carlsverock," in 23 Edward I. (London, 1828, 4to), with a reprint of the "Rolls of Arms," by Jn. Wright, (London, 1864); White, "History of the Battle of Otterburn," in 1388 (London, 1857).

organized by the statute of Westminster 2, 13 Edward I. c. 3: "Justices of Assize shall be two justices of the realm, appointed on oath, who should take to them one or two honourable knights of the county." The sheriff henceforth summons the jurors only *pro forma* to the next terminal sittings at Westminster, "unless before that" (*nisi prius*) on a certain day the justice of assize appear in the county, which from this time was regularly the case. After further consolidations by 27 Edward I. c. 4; 12 Edward II. c. 3; and 14 Edward III. c. 16, the whole of the functionaries of the central courts enter into an organized connection with the civil assizes through the medium of periodical commissions.

An analogous course was taken by the criminal jurisdiction, which remained for a considerable time in a more unsettled state. The deputation of special commissioners for penal justice, "justices of oyer and terminer," still often took place, since political struggles as well as the combination of penal justice with the police control and the financial interests, caused greater variations in this department. Gradually, however, the commissions of *oyer* and *terminer* addressed to the justices of the realm, as well as the more comprehensive commissions of gaol delivery, became the established form in which the penal justice of the central courts entered into connection with the juries of the county. Through the regular union of the civil and criminal commissioners, the newer *ordo judiciorum* was carried out in practice. The separation of the question of law from the question of fact now forms the fundamental character of the English judicial system in quite a different fashion from that indicated in the *judicium parium* of Magna Charta. For these reforms there were accordingly needed express enactments of Parliament, as being deviations from the charter. But after standing instruments for uniting and developing the common law had been gained in the central courts, the consolidation of juries, which had been formed in the earlier period, took place in a threefold direction.

(i.) The civil jury existed after the *assise* of Henry II., by virtue of statute only, for the originally enumerated cases; and then in this form, that four knights of the shire appointed for the purpose, and twelve jurors elected by them, were to decide the principal question at issue. These form accordingly a court of decision "*per judicium parium vel per legem terræ*." Practical necessity had, however, extended the proof by commissions of twelve persons on oath as "*jurata*" to the whole civil procedure. In this more accessible and cheaper form their verdict became limited to the question of fact, and the method soon became so generally followed that the circumstantial *assisa* with the four knights is less



and less frequently used. At an early period, also, proceedings in evidence are taken before the civil jury; at first in the form that the witnesses who were present at the reception of documents, combined with and delivered their information to the jury; and again, that they, independently of the jury, gave their version of the facts at the judicial sittings. The transition to examination of witnesses in another fashion, and to other modes of taking evidence, was brought about in the practice of the courts. A taking of evidence before the jury was tolerably well developed at the close of the Middle Ages (Fortescue de Laud. c. 26).

(ii.) The grand jury was primarily connected with the county assemblies which the royal justiciaries had to hold at periods which became more and more regular. Their presentment duties consisted in summoning the individual hundreds, and causing the presentment made them to be inquired into and confirmed by a special jury of each hundred. This procedure must, however, have appeared a waste of time and labour, and from the desire for a quicker despatch of business a change took place, the first traces of which are visible in the year 1868. It had been found practicable to utilize the full assemblies of the county court for these *inquisitiones* also, as a grand inquest, or grand jury, in the face of which the presentment juries of the individual hundreds gradually decay. The great committee of the county absorbs the committee of lower instance, and makes use of the presentments of the communities, as also the information of the individuals, only as means to promote justice. In this manner accordingly the grand jury takes upon itself the duty of indictment, and in the face of it private prosecution more and more disappears. When about the same time the institution of justices of the peace had been established, a similarly constituted grand inquest was also applied to the quarter sessions of the justices of the peace.

(iii.) The petty jury in criminal cases, which Bracton and Fleta represent as a continuation of the presentment jury with partial changes in its composition, severed itself from the other in the course of practice. The principal separation was brought about by 25 Edward III. c. 8, according to which every *indictor* (member of the jury of presentment) may be challenged in the second jury (verdict-jury). And when soon afterwards the court of presentment became merged in the great jury which was formed of the county assembly, both jury courts appear under the names of the "grand" and "petty" jury in permanent separation. No reliable trace of a hearing of witnesses and other modes of taking evidence before this jury, can be discovered in the

whole of the Middle Ages. It is still always regarded as an inquisitorial commission of the community which has upon oath to try the indictments confirmed by the grand jury, and finally to decide from their knowledge of the vicinage and from information there collected "*an culpabilis sit vel non.*" And on that very account "neighbourhood" was an essential condition, and after the practice had become looser in the time of Edward III., it was required that at least six hundredors, and in Fortescue's time four hundredors should sit upon the verdict jury. (2)

In this way the fundamental maxim, "*Veritas in iuratore, justitia et iudicium in jure*" (Bracton, 186, b) became realized. Common to all three forms is the tender regard paid to the equality of the parties and the impartiality of the jurors. This system of "fair trial" is the best and the most enduring basis of English judicial life. After it had been carried out on a great scale, the necessity arose of consolidating the duty of serving on a jury. Originally the jurors in the county as also in the sub-districts were chosen from among the traditional lawmen, that is, they were *legales milites, liberi et legales homines*. But the duty of serving as jurymen was by its nature built upon a broader basis. For judging an

(2) An old fundamental error considers this thorough organization as connected with the provisions of Magna Charta, whereas the guarantee of the *iudicium parium* in Art. 39 of the charter actually formed an impediment to reform. Much as such reform was practically required, public opinion adhered as tenaciously as ever to the Anglo-Saxon principle of constituting a court of men and *peers* of the hundred, appointed to find the verdict. But the opposition was, as might be expected, most keen in criminal cases; and the slower course of development of the verdict jury can be also thus explained. The practice of the courts found a remedy at first in this way, that it caused the accused to submit voluntarily to the verdict of a *jurata*, in place of the customary proof. In case the accused refused to do this, no other expedient was known, but that of an administrative measure, the so-called *peine forte et dure* (above, p. 190). In this there was an evasion of the principle by a sophistical trick, which, practised on the Continent in much greater dimensions, leads to torture, whilst in England it remains restricted to a middle course, and is in later times even acknowledged in this form by Act of Parliament (*vide* Palgrave,

ii. 189, 190). By this firm adherence to the old *ordo iudiciorum* it is also explained why in the criminal assizes such importance was still attached to appointing a number of knights of the shire, as *peers*, on the commissions of justices. The basic fundamental idea of the jury is, that the establishment of fact in the trial (the determination of the bases of the judgment of the court) should proceed from the district and community concerned, because the knowledge possessed by the vicinage of persons, things, and circumstances, cannot be dispensed with, and least of all, where the presiding justices only come at stated times from long distances, and it is an established principle that they shall be strangers to the county. At the close of this period Fortescue in his "*Laudes Legum Angliæ*" regarded the criminal jury still only as a practical institution for judicial proceedings on evidence. The annual participation of thousands in the practical administration of justice became politically important; as also was the newer and more uniform distribution of the judicial burden among knights, freeholders, and boroughs, which has become a fundamental principle of representation in Parliament.

habitual participation was necessary, which was only practicable for the greater landowners. In stating the question of fact, an exact knowledge of the district of the *vicinetum* was requisite, as well as personal integrity, and for this the smaller freeholders were as well qualified as they were indispensable. Participation in delivering judgment might appear as an important political right; the summons on the newer commissions of evidence appeared as a newly established service, and the taking part in such could scarcely become a subject for class-jealousy. The danger now rather lay on one side in the burdening of the poorer classes with this duty, and on the other in the diminished trustworthiness, the corruptibility, and timidity of these elements. Therefore it was necessary to fix upon an average scale of landed property, to which the duty of serving on a jury should attach. In dealing with the evil result: "that otherwise the rich would go free and the poor constitute the juries," the stat. Westminster 2, c. 38, enacts first that only freeholders of twenty shillings value in land should be summoned to the *assisa*. By 21 Edward I. stat. 1; 2 Henry V. c. 8, this rating is doubled; only persons of forty shillings income from land (or one-tenth of the rating of a knight's fee) should be summoned. (2<sup>a</sup>)

The fact that the royal justices of assize presided in it preserved at this time the character of the county court as a court of common law. In contradistinction to the ordinary sittings of the county court, prelates, barons, knights and freeholders still appear before the royal justices of assize; from each township twelve citizens, and from every village the village bailiff with his four men. This suit royal of the prelates and barons, which was again expressly confirmed by the Assize of Clarendon, hindered the courts of common law from being divided into separate courts for the nobles, knights, citizens, and peasants; and even though the upper classes display a constant tendency to be quit of the suit of court in the county court, and though the statute of Merton permits representation by proxy, and the statute of Marlborough releases persons of higher rank than a knight from appearing in the sheriff's tourn, yet a liability to appear on special summons still remains. The origin of a privileged

(2<sup>a</sup>) This has been at all times the practical side of the question. The wealthy bribed the sheriff, in order to get free from service; the parties endeavoured to entertain and bribe the poorer jurors. In 1 Edward IV. c. 3; 1 Richard III. c. 4, the reasons propounded speak of the abuse of poor and unconscientious persons sitting on the

presentment jury of the sheriff. In other places acts of violence are spoken of with which the jury are threatened by the litigants (22 Ass. pl. 44). The gradual disappearance of a *Magna Assisa* composed entirely of knights (of which we have an instance as late as the year 1348) is connected with the aversion against serving on a jury.

court in England is confined to the jurisdiction of the peers over their members which sprang up under Edward II.

After all these changes the old office of sheriff has in great measure lost its independent jurisdiction. In this capacity it remains only an instrument of the supreme court for functions in which a provincial organ is indispensable, for instance for the issue of summonses, for executions, and for the empanelling of a jury. Under Edward I. the sheriff's judicial competence for civil matters is restricted to petty suits not exceeding forty shillings; to which are added his inquisitorial, police, financial and administrative functions. Through its police control, its privileges, and its fees, the office is however still sufficiently important to be the object of solicitation. Manifestly in order to fall in with the wishes of the knighthood, the attempt was therefore twice made to fill the sheriff's office by a county election. The first attempt was made in 1258 by the statute of provisors, but ended in pure party elections, and was subsequently annulled. The second attempt (28 Edw. I.) had for its result that after seven years the sheriffs were obliged to be deposed *en masse*, and others appointed in their places. The suffrage proved inapplicable to the judicial and police officers. The sheriff accordingly remains an under-officer of the Exchequer and the King's court, and is proposed for the King's sanction by the treasurer, the chancellor, the barons of the Exchequer and the *justiciarii* (9 Edw. II. stat. 2), as is done in effect at the present day. He had to possess sufficient real estate to carry his responsibility, and was not allowed to farm out his office. (2<sup>b</sup>)

The indirect effect of these magisterial institutions, was finally the further decay of the regular hundred and manorial courts. No new law, no reform, was extended to them; the absolute validity of judicial documents in evidence is as a rule confined to the royal courts of record; the want of a jury, of a right of distraint, and of summary penal jurisdiction, was

(2<sup>b</sup>) The appointment of the sheriffs who are proposed by the treasurer, chancellor, and the judges (9 Edw. II. stat. 2), was fixed at a time in which the monarchy was involved in a conflict with the great barons on account of the appointment to the great offices of State. This statute secured on the one hand the constitutional influence of the council, and on the other a certain impartiality in making the appointments. The idea was that the chief officials of the permanent council should exercise the right of proposal. In 14 Edward III. stat. 1, cap. 7; 23 Henr. VI., cap. 8, accordingly the

Lord Chancellor, the Lord Treasurer, the President of the Council and the three presidents of the central courts of law were mentioned. In Fortescue's time all justices of the realm were wont to meet together with the great officers and members of the council of State. These are all only variations in the process of business of the council of State; in like manner as the custom of proposing three candidates to the King also originated from practice. As to the still considerable fees attached to the office of sheriff, cf. Thomas, Exchequer, 51.

enough in itself to make them impracticable, and to bring the jurisdiction over the *villani* (copyholders) more and more completely to the regular courts. Even where a landowner has been granted as a franchise the right of appointing a bailiff by the *clausula* "*non omittas*," 13 Edward I. c. 29, the sheriff may execute every order of the court in such franchise, if the bailiff does not do it properly. Of course fragmentary remnants of the old *régime* still occur. The *infangtheft* and *outfangtheft* were, under Edward I., occasionally put in force by manorial courts, and as late as 1285 two cases occur in which a court baron passes sentence of death for felony.

III. *The exercise of the police power* becomes connected with the county in a new way, by the office of *justice of the peace*, which had been formed after a long series of experiments. The parliaments of this period begin with complaints of the insolence of the magnates, and of feuds and brawls, which after the times of the Barons' Wars appear again periodically. Hence there resulted together with the militia code a formal police-code in the statute of Winchester, 13 Edward I., which begins with the words: "As day by day robberies, murders, arson, and thefts, occur more frequently than they ever did before"—therefore the old police regulation touching the "hue and cry" was strongly enjoined, the landlord was made responsible for the guests he harboured, the hundred for reparation of damage done within its district, and a more extensive duty to do militia service, and a system of watch and ward introduced. But there was also a concurrence of various social reasons for extending and multiplying the province of the police-power. Town and country life in England had not become quite separated each from the other, and there existed free intercourse to such a degree that the communities, having become mistrustful on account of their liability to make compensation, had frequently to require that suspicious characters should find security for keeping the peace and for their good behaviour. With the comparatively early decay of villeinage and with the introduction of free transactions of hiring and letting, the intimate bond between property and labour became loosened in many places. By free intercourse and unfettered industry, the unstable relations between property and labour became welded together, and capable much earlier than on the Continent of being regulated by comprehensive laws. The numerous industrial enactments, which in Germany must be looked for in the police regulations of towns, and in the statutes of guilds, appear here as subjects of general legislation; at first as royal *assises* and ordinances, and later as parliamentary enactments. To these belong the legal fixing of the price of

bread, beer, firing, and other necessities of life, *assise venalium* (at the same time with regulations against adulteration), the most important of which is called the *assisa panis et cerevisie* (51 Henry III. c. 5), all of which are continued as periodical tariffs. Regulations affecting the bakers' trade, the preparation and manufacture of leather and woollen cords, the preparation of malt, brick-making, the coal trade and sale of firewood, market police-rules, and the general provisions of a trade-code form a very complicated legislation. (8) To these were added the police laws affecting labour, which stand in the place of the "law of socagers," and of the guild and urban police institutions on the Continent. The first statute of labourers, 23 Edward III., cap. 1, was promulgated after a great national calamity, which had diminished the number of working hands, and increased the ordinary rate of wages. By it the working men are ordered to serve every employer of labour at the customary wages. Connected with it there became defined in practice the notion of combinations, that is, of prohibited unions for obtaining an increase of wages. Further connected therewith is the prohibition of giving alms to able-bodied beggars. By 12 Richard II. c. 7, every labourer is forbidden to leave his place of abode without a certificate of the magistrate that there is a good reason for his doing so; whosoever is found wandering about without such certificate can be apprehended and put in the stocks. Those who are unable to work shall return, in case of need, to their birth-place to be supported there. According to the strength or weakness of the successive reigns so does the rigour of the labour police vary (13 Richard II. cap. 3; 14 Richard II. c. 1. 2; 2 Henry IV. c. 5; 4 Henry IV. c. 15; 5 Henry IV. c. 9; 11 Henry IV. c. 8; 9 Henry V. c. 9, stat. 2; 8 Henry VI. c. 24; 27 Henry VI. c. 3; 17 Edward IV. c. 1; 1 Henry VII. c. 2; 3 Henry VII. c. 8). But a warning to exercise moderation existed in the rebellion of the peasants under Richard II. The statutory tariffs of bread and beer were intended in some measure to act as a counterpoise to this. Elements of a *police des mœurs* were also contained in the comprehensive meaning of the term "common nuisances" by which disorderly and immoral houses were punished; in laws affecting luxury in dress, food, and other extravagances—the last-named in connection with fantastic practices which the paid soldiery brought back with them from the French wars. To this head belongs the dinner law (10 Edw.

(8) The scope of these laws is best seen in the modern repeal acts, such as 49 George III. c. 109, which affects forty statutes dealing with the woollen

manufactures from 2 Edward III. downwards (cf. 19 and 20 Vict. c. 64). A kind of general trade code resulted from 3 Edward IV. c. 4.

III. stat. 3), *de cibariis utendis*, which allowed for dinner and supper only two courses; the great laws against luxury (87 Edw. III. c. 8-14) relating to dress and meals, repealed, it is true, in the following year, but partly revived under Edward IV. Supplementary to the above there existed besides a summary penal power residing in the King's Bench, as *custos morum*, as well as the right of the magisterial police to enforce the finding of a security for good behaviour in cases of offensive acts of public immorality. The idea of *nuisance* embraces, besides, a number of disputes between neighbours; among others also the first forms of highway regulations, and a highway police. Further connected with these follow hunting and fishing laws in an almost innumerable series.

To deal with this complicated system there had existed hitherto merely the sheriff's tourn and the courts-leet. Although the Great Charter had withdrawn from the *Vicecomes* the royal criminal accusations, yet there still remained to him the first interference, the taking of security, the police *inquisitio*, as well as the functions of police magistrate, where petty criminal cases were concerned. The investigation in these courts was, however, somewhat different from the proceeding of the present day. It did not take place publicly before the community, but in and by the community itself, with constant summonings of bailiffs and lawmen, with examinations on oath as to knowledge, ignorance, and belief. It was not only that this constituted the heaviest burden of the judicial duties of the people, the community having to be summoned *en masse*; the further and main fault was unmistakable, that the terms and forms of a court were inadequate for the preventive purposes of a police of this description, which presupposes a much greater amount of activity. The local courts-leet were on this account just as little equal to the performance of such tasks as were the sheriff and his under-bailiffs. Experience made it ever more clearly felt, that assemblies of the community neither *in pleno* nor yet in committees could conduct a police administration in the form in which it was then constituted, owing to the extended character of the system of preservation of the peace and the police laws for trade, labour, and morals. So soon as a police system by virtue of express enactment, takes the place of patriarchal regulations, the carrying out of these regulations by single officers, and their more summary enforcement, must lead to the creation of a judicial office.

As early as the reign of Richard I. a first attempt was made to associate with the sheriff, district-deputies, *custodes placitorum coronæ*, or coroners, who were described in the capitula of 1194 as *custodes placitorum coronæ*. Their func-

tions consisted in keeping a watchful eye on the royal taxes, rights, and dues, and are probably identical with those of the later coroners. Edward I. gives these officers exact instructions how to proceed with a commission of inquest chosen from the neighbourhood in the case of unusual deaths. After 28 Edward III. c. 6, they were chosen in the county court from among respectable landowners, and presented to the King for his appointment. This first formation did not develop itself further; it confined itself to inquests as to causes of death, to cases of embezzlement of treasure, and to assisting the sheriff in certain cases. The monarchy was probably not inclined to extend the powers of these chosen officers. It is likely that in early times, as a consequence of the inadequate principles of their election, they proved themselves inadequate officials. (3\*)

Towards the end of Edward the First's reign, in disorderly times and districts, a kind of court-martial under *justices of trail baston* began to be instituted, which was also in later times occasionally repeated, but met with opposition on account of its too summary character. Shortly after Edward II. ascended the throne, *conservatores pacis* were appointed in every county, who were to reside continually in their counties and visit all parts of the same, "to watch over the observance of the police code of Winchester, and the royal decrees relating thereto." This also remained only a passing attempt. But a very serious occasion for the appointment of local police magistrates arose at the accession of Edward III. After the deposition of Edward II., his criminal spouse and her followers feared that general disorder would ensue. They therefore caused by ordinance (1 Edw. III. c. 16) the appointment in all the counties of police magistrates, chosen from the ruling faction—"bonnes gens

(3\*) Without doubt the *coronator* occurs under John and in Magna Charta; and is described in detail in the law books of Bracton, Fleta, and Britton, c. 1. As to their procedure, a very thorough ordinance, 4 Edward I. *de officio coronatoris* was issued; and it is also described in the *statutum Wallie* (12 Edw. I. c. 5). In addition to the itinerant financial commissioners, other persons also, who were presented from the county itself to the King, could exercise a control over the maintenance of the rights of the revenue and the Crown; out of this there was formed an *inquisitio* after the manner of a sheriff's tourn, with commissioners of the township, which was to intervene in the vacations between the periodical court

days, whenever a speedy investigation on the spot was needed. Violent deaths and cases of treasure trove thus became the principal province of the coroner. According to the oldest indications we possess, this officer was to be presented to the King by the chancellor, the current formula for which, a "*breve de corona tore eligendo*," is very ancient. The jury to be summoned by the coroner is to be collected from the nearest villages to the *inquisitio* (*per eorum sacramentum inquisitionem faciant de homine occiso*), and it was regarded as understood, that at least twelve jurymen must be present, and twelve be of one accord in giving their verdict. Special qualifications were not required of this *ex tempore* commission.



*et loyaux assignées à la garde de la paix*," to act as assistants of the sheriffs and of the itinerant justices. In the following year police-magistrates were appointed with a commission of *oyer and terminer*, that is, with real penal powers. But these again ceased when the occasion for their institution disappeared, and the change of party took place. The idea of the appointment of police-magistrates from the district of the county had in the meantime become popular. In 18 and 20 Edward III. new attempts and new proposals were made. In 21 Edward III. the commoners make a proposition to the King, to appoint about six police magistrates in each county—two lords, two knights, and two men of the law. The difference of opinion on the matter lies principally in this, that the King and council cleave to the royal prerogative of appointment, whilst the estates lay the greatest weight upon the election of great landowners. But in the meanwhile the disputes with the labouring classes had arisen, which necessitated the statutes of labourers (28 Edw. III. c. 1; 25 Edw. III. c. 8). For the putting of these laws into execution according to their spirit and their letter commissioners endowed with extraordinary powers were appointed, who were to hold their sittings four times a-year in each county. The idea of applying the principle of election to the statutes affecting labourers could not for a moment be entertained. These police-magistrates, appointed by royal nomination, proved successful, and agreeably to this precedent, after long experimental formations, there ensued at last in the year 1360 the appointment of district police-magistrates, as a permanent institution, by 34 Edward III. c. 1. "In every county of England there shall be assigned for the keeping of the peace, one lord, and with him three or four of the most worthy men of the counties, together with some learned in the law, and they shall have power to restrain offenders, rioters, and other barretors, and to pursue, arrest, take, and chastise them according to their trespass or offence; and to cause them to be arrested and duly punished according to the law and customs of the realm, etc., etc., and also to hear and determine at the King's suit all manner of felonies and trespasses done in the same county according to the laws and customs aforesaid." (3<sup>b</sup>)

(3<sup>b</sup>) The origin of the office of justice of the peace is treated of at length in Reeve's History, ii. 472; iii. 216, 242, 265, 290; iv. 154. The old work of Lambard, "Eirenarchia, or the Office of Justices of the Peace," is still in use in various editions, from 1581 to 1619, 8vo. Still more detailed is Dalton's "Justice," 1618, last edition 1697 fol., which contains historical

notices, and much confused matter. Historical excerpts from Hardy are contained in the "First Report on Constabulary Force," pp. 192-202, (1830). The historical notices contained in Blackstone are taken from Lambard, especially the vague and confused expression that there existed, according to common law, *conservatores pacis* either by custom or by feudal tenure,

After many new proposals had been made, Parliament demanded that the police magistrates should hold common sittings four times in each year; this was granted, and by 36 Edward III. c. 12, it became law. In the ensuing year a petition was addressed to the King to the effect that he might be pleased to allow the knights and burgesses in Parliament assembled, to elect "the justices of the peace, and the justices of labourers and artificers," and that the persons so elected should not be again removed. The reply ran, that Parliament might propose the persons, but that the King would appoint according to his pleasure. Once again, in 50 Edward III., a petition was presented, praying that Parliament might appoint the justices, and that they should not be deposed without the consent of Parliament. The reply to it ran, that the judges should be appointed by the King and his (permanent) council, and herewith the election question was settled for ever.

In this period, also, the more honourable title "justices" occurs in addition to, or instead of, the older term, "*custodes pacis*." The form of the commissions was at the commencement of Richard II.'s reign already similar to that of

with the obligation to maintain the peace, or such as had been chosen from the people in the county courts (Lambard, 15-17). By the proceedings of 1 Edward III. c. 16 the choice of the guardians of the peace was first of all taken from the people and then given to the King (Lambard, 20). This passage, which has been copied again and again, must have given rise to the erroneous idea that there existed in England elected or manorial justices of the peace. Officers chosen by the people, occupying the magisterial office of justices of the peace, have never existed in England since the Conquest. Traditions of this sort, which are also repeated in Coke, Inst., ii. 459, 558, 559, date from the constitution of the Anglo-Saxon townships. For the Norman period they are, on the showing of the records, false, and incompatible with the whole course of the development of legislation touching justices of the peace. The elected *custodes pacis* of this period are partly the coroners, partly the recruiting officers of the militia, partly the constables in the police administration, and partly anomalous personages, with whom in times of civil war experiments were made for a short time. These are officers having the right of first interference, of prosecuting the presentments before the courts of law,

at most with the right of enforcing the giving of security; but not royal justices of record with the right to pass judgment, and endowed with the numerous extraordinary and discretionary powers of justices of the peace. Just as little have manorial justices of the peace ever existed in England. The usurpations of the nobility under the House of Lancaster, and at the time of the Wars of the Roses, only produced confused conceptions of the kind, and in a few cases also hasty and impolitic grants. But when a case of this kind, touching the grant of the privilege of appointing justices of the peace, occurred in a charter for the Abbot of St. Alban's, and came on for trial before the King's Bench (20 Hen. VII.), the court declared, in concurrence with the Attorney-General, that the King was not authorized to concede by such a grant, to any person, the right of appointing royal justices, seeing that this was a prerogative inseparable from the Crown. Lambard himself confesses (i. c. 3) that "all offices for the maintenance of the peace are originally derived from the King, and that no duke, earl, or baron, as such, has a greater authority to maintain the peace than any private man."

our own day, and became gradually consolidated as a comprehensive instrument of penal justice, and police, and especially the newly promulgated police-laws. The duties of the commissions of peace were at this time twofold :

(i.) The preservation of the peace according to common law ; that is, apprehension, arrest, enforced bail, and all other police functions, which traditionally lay in the jurisdiction of the Norman provincial magistrates.

(ii.) Analogous functions according to the statute of Winchester, the statute of Westminster, and the later laws relating to the police control over trades and labour, which became more numerous with each succeeding generation. Actual criminal penalties were only inflicted by them when they sat in a body in quarter sessions, with the assistance of a jury. Their commission was drawn up on this matter in such general terms, that they exercised a concurrent criminal jurisdiction with the itinerant justices. In another direction, there were especially reserved to them, by the framing of the statutes, jurisdiction over a number of smaller offences against the regulations affecting trade, morals, and labour. No intention could yet be perceived in this materially to restrict the application of the jury. But the framing of the more recent police laws, gave them also in their own persons a comprehensive jurisdiction, which was to be exercised without a jury. It was not until the statutes of the following period that this became extended to an administration of summary justice without a jury, even against the accused person who denies his guilt. (3<sup>c</sup>)

The justices of the peace themselves must, according to the petitions addressed to Parliament, be chosen from the great landowners, whilst King and council look upon knowledge of the law as an essential qualification. As a body, they were now according to local needs really composed of both elements. The influence of the nobles under the house of Lancaster first introduced a fixed qualification (18 Hen. vi. c. 11). The justice of the peace is to possess lands of the yearly value of £20 (the rating, in those times, of a knight's fee) ; however, when sufficient landed proprietors were not available in the county, who were skilled in law and its administration, the Lord Chancellor was authorized to place

(3<sup>c</sup>) According to 15 Richard II. c. 2, their duties were to establish the facts of violent dispossession ; according to Henr. IV. c. 4, sec. 2, "the justices of the peace are for the future to have the power to hear on oath all manner of labourers, servants, and their masters, and artificers, touching all things which have been perpetrated by

them against the previous ordinances and statutes, and to punish them accordingly on their own confession, as if they had been convicted upon inquest." The statutes of the following period extend this gradually to an administration of summary justice without a jury even against the accused denying his guilt.

on the commission other persons learned in the law. By virtue of this clause, the rivalry between the landowners and the justices of the peace learned in the law or "the quorum," continued down to the eighteenth century. The renunciation of their right to legally fixed daily allowances, which became more and more the custom, at last brought about the disappearance of the mere professional officials from the commission of peace. (8<sup>d</sup>)

This new system of police control, as it steadily progresses, thrusts into the background the old institutions, and first of all the district police court of the sheriff. The *turnus Vicecomitis* remains, it is true, side by side with the justices of the peace. To the sheriff is also reserved the right of first interference, of inquisition as well as criminal jurisdiction in petty penal cases, with the co-operation of the townships. So far the relation remained one of rivalry, but to the disadvantage of the sheriff, whose unpopularity still continued, and whose police jurisdiction was doomed to further decay in consequence of the inconvenient change of office from year

(8<sup>d</sup>) In the clause of the commission, in which "two or more" justices of the peace are authorized to try and to judge, the proviso is added, that among this number one or more should always be appointed by name ("*quorum aliquem vestrum A. B. C. D. unum esse volumus*"). Those thus appointed are the members skilled in the law, who on this account are technically called "the quorum." In later statutes it is also specifically determined whether the justice of the peace is to act independently, or whether he is to act with the assistance of a colleague learned in the law. This office of justice of the peace, filled both by lawyers and landowners, is in fact only a new combination of elements that had long existed, a new blending of property and office. The King could from time immemorial appoint justices of oyer and terminer to hold the criminal courts; by the new arrangement he is obliged to appoint them by preference from among the resident landowners of the county. The itinerant justices had their *point d'appui*, or centre of gravity, in the royal council, and in the central courts of law; the justices of the peace have theirs in the county, and form in their periodical sittings a corporate body, which now becomes permanently connected with the juries of the district, and forms newly organized district administrations for police purposes, in the widest sense of the term. In the

commissions of the itinerant justices, in addition to the justices of the realm, lords and knights of the county were also appointed, but only as secondary personages, whose participation soon became a purely nominal one; in the commission of the peace the professional officers are only colleagues and assistants learned in the law, who gradually retire before the permanent influence of the great landed proprietors. As the non-acceptance of stipends (after 14 Richard II. c. 11) was declared to be required of the honour of lords and bannerets, the non-acceptance of wages altogether, soon appeared called for by considerations of honour, and thus the rush of lawyers and small landowners to the commission of the peace diminished. The great landed proprietors thus obtained compensation on a greater scale for their decaying manorial courts. But for the practical purposes of the police control, the requisite stability and the necessary force was thus gained. Inasmuch as the justices of the peace were appointed for the district of the county, and as their official jurisdiction was from the first to be exercised "as well within as without the franchises," they held authority over the disconnected manorial districts. And herein already we perceive the principal reason why the justices of the peace gradually ousted the old courts-leet.

to year. Sheriffs were deprived of the important powers of preliminary inquiry by 1 Edward IV. c. 2, 3 (1461). Their functions were restricted to a jurisdiction of first instance, and the taking of indictments, and the actual order of arrest: all further proceedings had to be left to the next quarter sessions. But, on the other hand, the execution of penalties still remained to the sheriff; for which function the organization and financial administration of the sheriff's office was originally framed, and for which they remained suitable.

The same course of development was taken by the manorial and borough courts-leet, which had branched off from the sheriff's tourn. For a certain time they still competed with the office of the justices of the peace; that is, they acted by means of a continued summons of the assemblies of the townships for the purposes of the inquest and police convictions. They still continue, but in principle are restricted to their old jurisdiction at common law, except where the criminal jurisdiction over new penal offences has been expressly given them by statute law, as was done frequently in the province of police regulations affecting labour and trade. In this condition of free competition, the court-leet (except in very few places where accidental circumstances kept it alive) becomes gradually overshadowed and choked by the newer and more vigorous institution of justices of the peace. These were at all times accessible, whilst the court-leet was only opened twice in each year, and then only for a short time. The justices of the peace gain from generation to generation new and effectual penal powers, whilst the court-leet, as a rule, remains restricted to a cumbrous inquisition, and to the penalties of the common law. At the close of Edward the Third's reign (51 Edw. III.) Parliament again prays that no penal offences shall be sent to the justices of the peace, which ought to be decided in the leets of the landowners and boroughs. The answer ran, that the laws which had hitherto been enacted (police regulations) could not be maintained, if this petition was granted. From that time the decay of the leets silently proceeded.

The subordinate functions of the maintenance of the peace, which were exercised as a jurisdiction of first instance in the townships, tithings, and *villages*, by reeves and the lawmen of the district, in the form of committees of the township, together with the duty of giving informations, passed gradually into the office of the reeves of the township, who now subordinated themselves to the justices of the peace as they formerly did to the sheriff's tourn. These inferior functions follow the course of development of the higher ones. In the place of the indicting township, there

now appears at the sessions of the justices of the peace, a tithing-man, who, from the time of Edward III., bears the title of constable, a name taken from his militia functions; he makes his presentments there, and keeps watch over the peace in his district (just as the chief constables did in the hundred), with the old duties of a guardian of the peace, and various new official functions which have been successively imposed upon him by the police laws relating to trade, labour, and morals. (3°)

IV. The connection of the financial administration with the county is bound up with a system of local taxation which dates from earlier times. The dues of the county unions consisted for a long time only of services and matters rendered personally and in kind, whilst the central government had even in early times adopted a properly organized revenue system. Supplementary payment in money is already found in Norman times, in consequence of the innumerable amerciaments and fines. The oldest payments in money were fines inflicted for the neglect of duty by individuals or communities; others served for procuring the necessary ways and means for the fulfilment of a common duty. Directly or indirectly, taxation was thus a complement of the judicial, police, and military services owed by the greater and smaller unions, in the imposition of which the pattern of feudal burdens pervades the lower spheres as well, distributing taxation according to the scale of freeholdings, houses as well as land, and profitable rights. In the practice of administration three grades became formed, which although they are only incidentally mentioned in the oldest statutes are presumed to have existed.

1. The "tithing" or "town-ley" (levy) served to discharge the amerciaments and fines of the township, and answered to the duties which the Norman constitution laid upon the

(3°) It was a division of labour, by virtue of which the duty of making presentment, as well as that of apprehending the breaker of the peace, passed to the constable alone. According to the statute of Marlebridge (52 Hen. III.), the whole township was only to appear in case of murder; in all other cases the sheriff was to be content if the provost appeared with four men. In the private leets, too, the failure of the lawmen to appear was never rigorously regarded. The current business accordingly fell more and more into the hands of the reeve alone, who came to be often called "constable," in consequence of his official duties in

the militia. In the statutes we meet with this title first in 12 Edward III. It appears to be regarded in the warlike times which followed as the more honourable title, and now drives the older designations from the popular language. Towards the end of the fourteenth century, it had become the ordinary official title of the reeve (cf. 2 Edw. III. c. 3; 3 Edw. III. c. 14; 25 Edw. III. stat. 1, c. 6; 36 Edw. III. stat. 1, c. 2). In the west of England however, townships are still found with two tithing-men, of whom the first is constable of the King, the second simply "head-borough" (Lambard, "Constables," pp. 9, 10).

tithings. Such were amerciements for escaped offenders, for the harbouring of breakers of the peace, outlaws and those for whom no security had been given; amerciements for neglecting to keep the paths, highways, drains and smaller bridges on roads belonging to the township in repair; fines for the neglect of accusations before the court. Where a special court leet had been granted to the township, the expenses of keeping the stocks in repair and other outlays connected with the local court were added to these: in somewhat later times again, amerciements for offences against the militia code, such as failure to furnish troops, neglect to keep the weapons and archery butts in repair, etc. Naturally such contributions were raised by the local authorities, that is, by the provost with the four men who represent the township at the sheriff's tourn. After the name "constable" appears, in the fourteenth century, in the place of that of provost, the name "constable's tax" is the prevailing designation for the same thing. The manner of distribution affected the same persons upon whom the military, judicial, and police duties altogether fell, that is, the freeholders, and consequently the lawmen of the court leet.

2. The hundred-rate served for the payment of the amerciements and fines of the hundred, for the maintenance of the hundred-court, to make good the disbursements of the chief constable after the introduction of the militia system, for the keeping of the bridges of the hundred in repair, and for contributions to the county as we shall mention below. It appears to have been apportioned by the bailiff (later by the chief constable) among the individual townships, where we meet with it again as "town cess," that is, as a common burden. The oldest statutory mention of it is in 13 Edward I. c. 6.

8. The county rate serves for the amerciements and fines of the county, for certain expenses of the county court, prisons, bridges, and certain military expenses. The raising of the county contributions appears to have taken place originally in such a manner that the sheriffs distributed them over the hundreds. By 8 Edward I. c. 16, 18, it was indeed enacted that the itinerant justices should raise these amounts from the persons liable to pay; but as such individual rating probably appeared to be impracticable, the older manner remained the prevailing one, which was to distribute the payment over the whole hundreds, and from these to divide it among the townships, by which method a fixed and fair proportion in the contributions was attained. But when the proportions had been definitely fixed, the whole business of assessing the taxes fell upon the townships.

Such being the chief causes for the levying of imposts, there arose accordingly a certain practice of assessing the neighbour

by the neighbour, to which people became accustomed by the Norman inquest. The increasing expense of keeping the roads in repair, and of the mustering of the militia, as well as, later on, the furnishing of armed contingents which was expected of the districts, and many other local necessities, caused on all sides the institution of committees of assessment. (4)

Meanwhile the time drew near when the employment of commissions of the townships could no longer be disregarded for the State taxation also. The raising of *scutagia* by the *Vicecomes* took place indeed according to the feudal registers; but even here the frequent change of ownership and sale of plots led to many disputes and to much arbitrary action. Still more numerous were the complaints of unfairness in making the *tallagia* assessments. Hence at an early period, instead of the sheriff, the itinerant commissioners of the Exchequer were charged to negotiate with knights and boroughs on these points. For great-disputes as to rights of the Crown "juries of inquiry" were frequently appointed. But when the Assize of Arms (1181) introduced service in the militia, with-classification according to property, Henry II. could not avoid employing a number of knights and *legales homines* sworn in for the purpose of acting as commissions of the townships. When the raising of a Saladin tithe (1187), the collection of Richard the First's ransom, and the levying of a general hide-tax in the same reign (1198) led to an entirely new assessment of taxes according to the amount of hides and of income, the appointment of knights of the shire and others was for practical reasons unavoidable. This system was continued under Henry III. For the assessment of the *carucagium* of 1221 two knights were to be chosen in full county court "according to the will and advice of the county court." For the income-tax of 1225 ( $\frac{1}{12}$ ) the assessment took place on a sworn declaration of the person liable to taxation, disputes were settled by a jury, the amounts collected by the

(4) As to the first formation of the county, hundred, and local taxation, compare the Report on Local Taxation of 1843, pp. 5-7, and the memoir of the Poor Law Board on Local Taxes of 1846, p. 45. The want of legal provisions as to assessments only proves that the general principles of the feudal and judicial duty decided the method. The report quotes as statutes which presuppose a local taxation, 52 Henry III. c. 24, touching the payments to be made by the township when their lawmen fail to appear at the accusation proceedings before the sheriff or coroner; and 25 Edward I. c. 12, 22

(Magna Charta), according to which no township was to be forcibly compelled to build bridges where this had not been customary at the time of Henry II. These quotations prove that the laws of the Middle Ages only occasionally touch upon these matters to remove individual abuses. But spontaneous growth prevails in no system of taxation. It was in this case the Norman system of government with its administrative system of fines, which had set the military, judicial, and police duties in motion, in accordance with the temporary necessities of the State.



reeve and the four men, and paid to four knights of the shire of the hundred (Charters, 355). The income-tax of 1232 ( $\frac{1}{10}$ ) was assessed by the reeve and four men elected by the township as "assessors" upon their oath (Charters, 360). The income-tax of 1237 was assessed upon the oath of the reeve and four men of each township, with the assistance of elected "assessors;" the assessment was verified by four knights and an ecclesiastic (Charters, 366). This method pursued by the assessment commissions continued as a rule uniformly under Edward I., and was among other cases employed in the towns for the assessment of the wool-tax that had then been introduced. After 25 Edward I. the committees of the township appear as a permanent institution. The ordinance prescribes that in each township four men shall be chosen, who shall report their assessments to the county authorities, who are thereupon to go from hundred to hundred and from township to township to hear complaints and to correct errors in the assessment. Nine years later (1296) it is decreed that a commission (jury of twelve men) of every hundred shall deliver their assessment to the assessors of the county. For this purpose they shall go from township to township and make with the provost and the four men a correct assessment. The assessment commission of the county proceeds again from hundred to hundred and from township to township, to see that no wrong has been done. But the more frequently the hundreds and counties agreed upon a fixed rate of contribution to the local taxes for the sake of simplification, the nearer did the application of the like proportions to the State taxes come. In the eighth year of Edward the Third's reign a widespread assessment of individual townships at fixed sums had come into practice, and from that time it became the custom to assess boroughs and townships according to these proportions, which are taken as a basis for taxation as between the townships. The assessment and the collection from the individuals was left to the *communitas*. (4<sup>a</sup>)

(4<sup>a</sup>) The proceedings taken upon the first attempts at taxing the whole income arising from personal estate are treated of in Palgrave, "Commonwealth," i. 275. At these first attempts a threefold process was adopted: (1) All inhabitants (with the exception of the Crown vassals) were compelled to prove on oath the full value of their income, as was done in 8 John. (2) An inquest was appointed to test the case where the oath of the taxpayer was doubted or called in question, as happened in 9 Henry III. (3) By direct assessment by inquests, which are

formed of townships or hundreds, in 16 Henry III., and then repeatedly occurring until Edward II.'s reign. In the course of this period the position of *Viccomes* in the assessment had to be quite given up, as the reclamations against it were interminable. But the itinerant justices were unsuited to the duty on account of their deficient knowledge of places and persons. Thus also a permanent necessity compelled the adoption of the inquest system. Complaints that one was assessed too high and another too low, were also made to the Exchequer, out of which

V. Now that the county-union had become a firmly organized entirety for military, judicial, police, and taxation purposes, it was further developed by the extension of the system of district unions to a considerable number of boroughs; in the majority of them in a more limited extent, but yet through the application of the same principles, so that the constitutions of the boroughs resemble, on a small scale, those of the county.

1. In the militia system the boroughs are in principle incorporated with the counties, and furnish their contingents according to townships, parishes, and hundreds just like the country. For London, however, a separate militia system soon arose, owing to the fact that the county of Middlesex was included in the government of the city. A small number of other towns obtained in this period by charter the "right of a county," and together with it a special civic militia.

2. In the judicial administration a special court-leet had become in the preceding period the characteristic mark of the civic constitution. To certain cities a civil jurisdiction was also granted after the new pattern of judge and jury. But the more important civil and criminal cases were all decided by the itinerant justices with a jury of the county.

3. The police administration also shows in the cities a gradual overshadowing of the court leet by justices of the peace. The number of the cities in which at the close of the Middle Ages the court leet was still of importance was probably not very considerable. The place of the court leet is taken in very important cases by the justices of the peace for the county, whose jurisdiction is expressly granted "as well within as without the liberties," and therefore within the separate civic districts. The good understanding sub-

a writ of *equaliter taxandum* was issued (Coke, "Inst." ii. 77). The township, for its part, was competent to raise the amount of the tax by distraining movables and money (Heyburn v. Keylow Mich., 14 Edw. II., B. R. Rot., 60) or by civil action. The most important information as to the assessment of taxes under Edward I. we owe to the treatise of T. Smith, "The Parish," 1857, and especially the advantage of being able to make more correct use of the "*inquisitiones nonarum*." These *inquisitiones* (cf. Cooper, "Account," i. 286-293) arose under the stat. 14 Edward III. stat. 1, c. 20, by which one-ninth and one-fifteenth were voted to the King for the extraordinary needs of the State and for war purposes, and which in this case were fixed at one-

ninth of the civic income, upon the ninth lamb, sheep, and wool-skin (the poorer classes being exempted). At the same time the clergy had granted one-tenth of their spiritualities and temporalities according to the rating of 1292. All this led to a complicated assessment, for which three successive commissions were now appointed. For each county respectable persons were appointed by name, to act as *assessors* and *venditors* for the assessment business, and who by sworn men assessed the ninth on corn, wool, and lambs; and then again the old Church tax and its relation to the ninth of the actual produce. The digest of the accounts for twenty-seven counties still exists in the Exchequer, and is printed as *Nonarum Inquisitiones* (1807, fol.).

sisting between the towns and the knighthood, as well as reasons of practical convenience, explain why on the part of the cities no opposition was raised on principle. Besides this, the respectable landowners and lawyers of the towns were also nominated as members of a commission of the peace. Nevertheless, the later city charters, after Richard II., were frequently framed with a view to a separate commission of the peace, whose quarterly sessions became an ordinary criminal court for which the town issued its own list of jurors. Side by side with this a rival jurisdiction of the justices of the peace for the county generally continued to exist. The special requirements of the market police were provided for in a special department of the clerk of the market, which under the name of a "court of the clerk of the market" enacted penalties for certain offences against the market laws, and under the name of a "court of pie-powder" served for the decision of certain market disputes, and for the inspection of weights and measures.

4. In the local taxation system the smallest boroughs ranked as townships or parishes, though the majority ranked as hundreds. London and some others, on the other hand, ranked as counties.

The number of boroughs becomes according to this system considerably increased. Under Edward I. fifty-four new ones are enumerated; under Edward II., sixteen; under Edward III., twenty-eight; under Henry IV., three; under Henry VI., four; and under Edward IV., two; so that the number of those places which possessed a kind of municipal constitution at the close of the Middle Ages exceeded two hundred. (5)

(5) On the extension of self-government to the municipalities, cf. Gneist, "*Gesch. d. Communal-Verfas.*" 194-204. With respect to the State government they are secondary formations. The exercise of magisterial authority could, from the nature of the public business, be only confided to larger unions. English self-government is accordingly based upon the counties and hundreds, that is, upon unions of districts and bailiwicks, and not upon townships. It is only the city of London that properly speaking has the character of a county. From this down to a number of small market-towns, the municipal constitution forms only an imperfect application of county self-government to a local union. The legal bases of the municipal constitution may, with Stephen and Merewether, be referred to the same heads as in the former period:—

1. The towns form a court leet or some other separate judicial district. It is, however, not sufficiently appreciated that by the introduction of the jury system and the justices of the peace, the form of the old judicial township was changed, and with it the participation of citizens also. The real life of judicial and police administration must be looked for in the assizes, the justices of the peace, and the jury. But the leet jury still retained a right of proposing the mayor or provost; and this right in process of time developed itself so far, that in some places the leet jury actually elects, whilst in others it only presents for election (Scriven, "*Copyhold*," ii. 860). In performing their police duties, the lawmen of the leet could also pass bye-laws which had the force of law within the district.

2. The boroughs are still in the

These are the bases of self-government by which the central government now entered into a firm bond of union with the county government, by which the classes of society, though differing in their landed and industrial interests, now become united together to fulfil their political duties; and, filled with the consciousness of public duty and a common zeal for the general welfare, all gain the capability of taking part in the government of the country. The recognition of personal liberty by Magna Charta is followed by the political liberty which calls the existing middle classes to take part in the government of the realm in the form of county and municipal unions. The political self-consciousness thus strengthened, from this time onwards unfolds itself in its firm national individuality, and challenges comparison with the great civilized States of the Continent.\*\*\*

position of *firma burgi*. It is, however, a fact not sufficiently appreciated by Merewether, that this relation was materially altered by the right of the counties and cities to grant taxes.

3. The class of burgesses still consists of the resident householders, who are included among those paying "scot and lot." The ordinances dating from the era of the house of Lancaster still recount the old characteristics of citizenship, such as being sworn to the King and the town; living by their livelihood, merchandise, or crafts; householding in their own persons and names; bearing tax and tallage, lot and scot. It has been frequently remarked that the English towns have never attained to the importance of those of the Continent. Their striving after separation lasts only as long as the old *régime* of the Norman *Viccomites*. So soon as those causes fell to the ground, thanks to the central courts and the altered position of the sheriffs, the towns remained unresistingly in the military and other systems of the county unity, and contented themselves with more restricted immunities. Their participation in the jury and in the commissions of peace, as well as equality in respect of taxation, kept them in active intercourse with the knighthood. Trade and industry moreover existed from time immemorial in the country also; conversely many landowners had also town houses. The administration of the provincial police magistrates gained respect and popularity. In short, the reasons are not found in England, which in Germany forced the cities to shut themselves off in fact and law and

to become fortresses, in order to avoid sharing the lot of the peasantry. Hence the municipal government in England was the reverse of that in Germany—it was the weaker part of self-government; and thus may be explained the somewhat subordinate position of the municipal deputies in the Lower House, though they exceed the knights of the shires in number.

\*\*\* The quiet but grand significance of this period is thoroughly appreciated by Macaulay ("History," cap. 1.): "Sterile and obscure as is that portion of our annals, it is there that we must seek for the origin of our freedom, our prosperity, and our glory. Then it was that the great English people were formed, that the national character began to exhibit those peculiarities which it has ever since retained, and that our fathers became emphatically islanders, islanders not merely in geographical position, but in their politics, their feelings, and their manners. Then first appeared with distinctness that constitution which has ever since, through all changes, preserved its identity; that constitution of which all the other free constitutions in the world are copies, and which, in spite of some defects, deserves to be regarded as the best under which any great society has ever yet existed during many ages. Then it was that the House of Commons, the archetype of all the representative assemblies which now meet, either in the old or in the new world, held its first sittings. Then it was that the Common Law rose to the dignity of a science, and rapidly became a not unworthy

Absolute rule is now superseded by a constitutional government according to law; a government which by means of permanent political institutions gives to the rights of the individual, and to the participation of the people in the government of the land, those guarantees which were aimed at in Magna Charta. The constitution of the Government and the division of power are now as follows :—

1. The ordinary administration of justice is consolidated in fixed judicial bodies, or central tribunals. These represent the most durable formation of the era of the rise of the estates (cap. 22).

2. The conduct of the highest political business becomes consolidated in a standing state council or permanent council (cap. 23).

3. The participation of the prelates and barons in the central government of the realm is fully established owing to their being periodically summoned to the royal council; in union with this they form the *Parliamentum* or *Magnum Concilium*, which at the close of this period has developed into an hereditary council of the Crown (cap. 24).

4. The participation of the *communitates* in the central government develops into a House of Commons (cap. 25).

The whole development of the government by estates of the realm confines itself, however, to the temporal side of the State, which is now confronted by the gradually increasing isolation of the ecclesiastical hierarchy (cap. 26).

rival of the imperial jurisprudence. Then it was that the courage of those sailors who manned the rude barks of the Cinque Ports first made the flag of England terrible on the seas. Then it was that the most ancient colleges, which still exist, at both the great national seats of learning, were founded. Then was formed that language, less musical indeed than the languages of the south, but in force, in richness, in

aptitude for all the highest purposes of the poet, the philosopher, and the orator, inferior to the tongue of Greece alone. Then, too, appeared the first faint dawn of that noble literature, the most splendid and the most durable of the many glories of England." Upon the obscurity described by Macaulay as existing, light can in most cases be thrown from the fundamental bases of this political system.

## CHAPTER XXII.

## The Courts of Common Law.

THE establishment of a definitely secured judicial system in the spirit of true monarchy begins with Edward I. The firmest barrier against arbitrary decisions under the personal government was formed in this period by three corporate official bodies under the names of Court of King's Bench, Court of Common Pleas, and Court of Exchequer. They may be designated the three ordinary Courts of Common Law, side by side with which certain special courts of the Norman feudal system still continued, to which I shall refer at the close of the chapter.

I. The Court of King's Bench had already under Henry III. become organized as a nearly permanent court, in which the King claimed the right to preside in person. This tribunal was on that account still to follow the person of the King as a "*Curia coram Rege ubicunque fuerimus in Anglia.*" With this condition, the court consisted of a bench of four or five *justiciarii*, whose president from Edward the First's time was called "*Capitalis Justiciarius ad placita coram Rege tenenda,*" and may to a certain extent be regarded as a successor of the old high justiciary, but only for judicial business. In this court are combined—

1. The *placita coronæ* or criminal cases, extended so as to include petty offences, but in such a manner that, as a rule, the same cases can also be dealt with by the justices of the peace at the quarter sessions.

2. The police control, which was from the first combined with the exercise of penal justice; the judges are in their official capacity the supreme *conservatores pacis*.

3. The constitutional appeal from the lower courts; in this sense Bracton calls the judges "*capitales, generales, perpetui et majores, a latere regis residentes, qui omnium aliorum corrigere tenentur injurias et errores,*" that is to say, a higher tribunal for the courts of the land, with the exception of the Exchequer, which in its capacity of supreme court of finance, stands in the same rank with it. (1)

(1) The formation of the Court of King's Bench is intimately connected with the discontinuance of the office of *Capitalis Justiciarius Angliæ*.

II. The Court of Common Pleas as a permanent court of law for civil actions between private persons, in which no royal rights were involved had also, from Edward I.'s time, its special president, under the name of a *Capitalis Justiciarius*, and its regular seat at Westminster. To oppose the excessive centralization, the statute of Gloucester (6 Edw. I. c. 8) prohibited the royal central courts of justice from dealing with claims not exceeding forty shillings; these petty cases were reserved to the county and local courts. Nevertheless the number of actions had increased to such an extent that from the time of Edward III. the number of justices was augmented from three to six, and occasionally to seven. In answer to complaints from the estates, the assurance was repeatedly given that *communia placita* were no longer to be heard in the Exchequer. The administration of justice by the King in person was also given up in these cases. (2)

After the Battle of Evesham, Henry III. did not again nominate to this office. In 52 Henry III., however, Robert de Bruce was by patent appointed to be "*Capitalis Justiciarius ad placita coram Rege tenenda*," and from this time this is the ordinary title of the president of the King's court, who is no longer to be governor general of the realm, but only a representative of the royal power in its judicial branch (Foss, "Judges of England," ii. 135; iii. 18). The number of his assistant justices was under Edward I. as a rule four, in the later years of the reign three; under Edward III. at first three, and then again four (Foss, iii. 19, 342). Fortescue (writing in the middle of the fifteenth century) says, that four and sometimes five justices sat in the King's Bench. As to the jurisdiction of the King's Bench, cf. Reeves, ii. 247, 248. If the King was within the realm, the court, according to Norman custom, was certainly always obliged to follow him. Edward I. and Edward III. insisted upon this, in spite of the petitions of Parliament (Foss, iii. 339). Under Richard II. also a circuit was made to Coventry and Worcester. But in the second half of this period the sitting at Westminster became the rule of practice, with the reservation of a change of place in time of war and national calamities. The kings have never expressly renounced their traditional right of presiding in person. John, from the fifth to the sixteenth year of his reign, was frequently present at the sittings (Foss, ii. 4), and also

held circuits in person in company with certain of his councillors. Henry III. also sat in person in judgment on certain important cases, and notably in an action brought against the burgesses of Winchester administered severe justice (Palgrave, i. 292). Under Edward I. and II. we meet also with isolated instances of the King presiding in person (Palgrave, Privy Council, 62). Circuits undertaken by the King, so long as the separate institution of itinerant justices lasted, occur until Edward III.'s accession to the throne (Palgrave, Commonwealth, i. 292). And even after the itinerant justices had ceased as a separate institution, the King sometimes took part in the circuits of the justices of his realm. Under Henry VI., on the other hand, it was, according to Fortescue, no longer "customary" for the kings of England to sit in court and deliver judgment themselves (Foss, iv. 215). Edward IV. is said to have once sat for three days in the King's Bench, but only "to see how his laws were executed" (Allen, Prerogative, 93). Hence we perceive that the monarchy was finally restricted to its old formal authority in the department of the administration of justice.

(2) The independent formation of the Court of Common Pleas is, according to the careful researches of Foss (ii. 160 *seq.*), of subsequent date to Magna Charta. The Germanic conception of the judicial office, and the desire to keep free from the influences of court favour or disfavour, showed itself more strongly here than else-

III. The Court of Exchequer now becomes separated, in its capacity as a financial tribunal, from the administrative central government of the Exchequer. The carrying out of the fundamental provisions of Magna Charta rendered a change in the administration necessary for a great part of the Exchequer business. Free persons and free property were at all times to be judged "according to the law of the land, and the customary forms of procedure." A number of Barons of the Exchequer accordingly associated themselves into a judicial body for this department of business, which may be compared with the judicial division in the German "Kriegs und Domänen Kammer" in later centuries. To make these judicial decisions independent of the influence of the heads of the department, the judicial division after Edward II. also received its own president or Chief Baron, who was as a rule chosen from among those persons legally qualified for the judicial office, and was often expressly appointed for life.

Notwithstanding this, the position of the court continued to be a somewhat subordinate one. Its members were usually appointed from among the higher officials of the Exchequer department, from whom it was difficult to eliminate the financial spirit. Hence it is the more readily conceivable that the retention of the old method of assigning ordinary pleas to the Exchequer now led to loud complaints. In 5 Edward I. a royal writ was addressed to the barons, which in general terms prohibits them from dealing with *communia placita*, as being contrary to the letter of Magna Charta.

where. The necessity of a fixed and determinate administration of justice in ordinary civil disputes has been most keenly felt, especially under John's system of government, who had, in the eleventh year of his reign, sat in judgment at not less than twenty-four places. This gave rise to the clause of Magna Charta "*Communia placita non sequantur curiam Regis sed teneantur in aliquo certo loco.*" Under Henry III. this assurance was acted upon in so far that civil actions were for the most part dealt with in a special division of the King's court, and indeed at Westminster. But it was not till after the accession of Edward I. that Gilbert de Preston was definitely designated as *capitalis justiciarius* of this division (Foss, iii. 20). The number of the assistant justices varied under Edward I. between four and six; under Edward II. was as a rule six; in 6-9

Edward II. a seventh was added to their number. Under Henry VI. the number once reached eight. The official name of this court is "*Commune Bancum*," and in contradistinction, the King's Bench is called "*bancum regis*," or "*bancum nostrum*." The assurance given in Magna Charta as to the fixed seat of this court of law was not followed out to the letter; a removal still took place frequently, and notably from Westminster to York (Foss, ii. 135, 175, 177 seq.; iii. 16; 343 seq.; iv. 13). But in the second half of the period the sittings at Westminster must be regarded as established by law. The limitation of its competence to claims exceeding forty shillings was rendered somewhat ineffectual by evasion by means of fictions (Blackstone, iii. 86). As to the limitation of the *communia placita*, cf. Foss, ii. 135.



This was repeated in the statute of Rutland (10 Edw. I.), with the remark, that in this manner the King's suits as well as those of the people were unduly protracted. As, however (probably in consequence of the interest in the court fees), the rule was often evaded, it was again repeated in the *Articuli super Chartas* (28 Edw. I.), and then once more in 5 Edward II. In later times the rule was again evaded by fictions. Yet in substance a better state of civil and penal justice was attained by the separation of the courts, which could be no longer compared with the condition of things in the former period. (8)

IV. The continuous consolidation of the staff and the course of business of the benches of judges, is further shown in the following alterations. The judicial benches gradually absorb the separately appointed itinerant justices. Under 13 Edward I. c. 30, the Justices of Assize and Nisi Prius were to be appointed from the sworn justices of the King. According to 27 Edward I. c. 3, 4; 12 Edward II. c. 3; and 14 Edward III. c. 16, every justice of the central courts and every baron of the Exchequer may, if he is a professional lawyer, sit as itinerant justice on any case, it being immaterial into which court the matter was introduced. Whereas the itinerant justices were originally *delegati principis*,

(8) At this time the Treasurer and the Chancellor of the Exchequer are regarded as leading officers of the Exchequer, side by side with whom, for cases which were to be decided upon argument, a number of barons formed a Court of Exchequer Chamber. The appointment of a *Capitalis Baro* by royal patent only dates from May 30th, 1317 (Foss, iii. 196, 198; Thomas, Exchequer, 107, 108). The number of the assessor judges was four, five, or six (Foss, iii. 196; iv. 233). These assessors were as a rule promoted under-officials; their pay remained during the whole period far below that of the *justiciarii* (Foss, iii. 44). Only the office of Chief Baron was as a rule filled by *servientes ad legem*, whence also, according to 4 Edward III. c. 16, the Chief Baron can be appointed a justice of assize, "if he belong to the sworn sergeants of the King." It was not until the time of the Tudor dynasty that the barons were put on a perfect equality with the justices both in qualification and rank (Foss, v. 409; vi. 17). The more conceivable is it, that the public, as well as the lawyers, viewed with unwilling eyes civil actions brought into the Exchequer. By the *Statutum*

*de Scaccario*, 51 Henry III. (1266), it had been already provided that the treasurer and the barons should bind themselves by oath not to interfere in the affairs of private individuals whilst they were engaged in transacting the King's business; excepting only complaints against officers of the Exchequer, who retain their exclusive judicial privilege in the court itself (Foss, ii. 196). But it was not until Edward I.'s reign that it was acknowledged, that the parties have a right to such non-interference according to the principles of Magna Charta (Foss, iii. 22). When in later times there arose out of the official position of the Lord Chancellor a new equity jurisdiction, which acted according to the principles of administrative justice without a jury, in addition to the judges, the chief of departments, i.e. the treasurer, and the Chancellor of the Exchequer, participated in this new arrangement (Thomas, Materials, ii.). The old Exchequer appears from that time to be dissolved into four divisions; which, however, are partly formed of the same persons: (1) The Court of Accounts, (2) The Court of Receipt, (3) The Court of Pleas, and (4) The Court of Exchequer in Equity.

they now gradually appear as *delegati* of the permanent courts. The commissions which were formerly separate were now assigned to them in union, and became more and more systematic. Under Henry VI. the maxim was established that every justice of assize represents the whole tribunal in which the action has commenced. Thus the most dangerous feature of the old judicial commissions disappears. About the middle of Edward III.'s reign the special itinerant judges disappear before the ordinary justices of the central courts. In addition, it is true, special *commissions of oyer and terminer* were still addressed to the local judges as necessity required in turbulent times. After the introduction of the office of justice of the peace, however, the local criminal commissions acquire a permanent judicial form, and thus the organization of the judicial offices was completed. (a)

The higher judicial staff now forms a paid and learned official class, as a rule distinguished by titles, as knights-bannerets, knights, or knights of the Order of the Bath. A motion made in Parliament that it should itself pay the justices their salaries, was rejected. (b) As personal servants of the

(a) The statute 13 Edward I. and the following statutes aim at employing the whole staff of all the courts in the civil assizes: 27 Edw. I. c. 8 and 4; 14 Edw. III. c. 16. But with the circuits of the justices of assize a general *commission of oyer and terminer* became now more and more regularly combined, addressed to the Lord Chancellor, certain high officers of State, barons, the justices of assize and their representatives, for dealing with all crimes and a large number of offences, supposing that they have been committed and have been presented in the county. But the right accorded by the statute of Westminster 2 of appointing special commissions for special cases still remained reserved. By 2 Edward III. c. 2, the assurance was given that such commissions should be regularly issued to justices of the realm, and only in urgent exceptional cases to other persons (Coke, Inst., ii. 419; iv. 152). This was followed by a more extensive *commissio ad gaolas deliberandas*, for clearing the county prisons, in which the separate prisons were named under the great seal. A further *forum deprehensionis* was thereby originated, the first-named commission only embracing a *forum delicti commissi*. Hence, as early as the reign of Edward III., the staff of the special itinerant justices diminishes (Foss, iii.

359-360). They are last mentioned in the years 1333 and 1349. Pecuniary interests also tended towards the same end; as every justice of the realm in his capacity of justice of assize obtained the considerable addition of £20 to his salary. The commissions of *oyer and terminer*, which were still specially appointed, were only to be appointed in urgent cases, and then in an impartial manner, not by the magnates, and not by the parties, but by the authorities themselves (2 Edw. II. c. 2; Coke, Inst., ii. 419; iv. 152). According to 20 Richard II. c. 3, no man is to be justice of assize or of gaol delivery in his own county, and no "magnate of the realm" is to sit with the judges in the assizes.

(b) The personal position of the justices of the realm shows us their honourable standing, nearly on a par with that of the highest officers of the realm. Personal disrespect towards them was punished with great rigour (Foss, iii. 48). Their salaries remained during this period comparatively uniform, £40 for the chief justices, forty marks for the puisne judges and the chief baron. The justices and the chief baron always received an additional pay of £20 as being justices of assize, and many judges besides received additional emoluments. Under Henry VI. the chief justice of the

King they are paid out of his personal income, and subjected to his personal penal power. For example, Edward I. deposes his chief justice, Hengham, and inflicts a fine of seven thousand marks; the other justices were fined from three to six thousand marks for extortion, and probably, also for corruption. This penal jurisdiction was not questioned in the century embracing the reigns of Edw. I., II. and III., and was repeatedly put in force. But still more stringent was the precedent made in Richard the Second's reign, when the justices took part in the feud of the great nobles, and returned a doubtful opinion as to a royal ordinance. After the failure of an attempted *coup d'état*, all who had been implicated in delivering the opinion were condemned to death by Parliament for high treason, and the chief justice, Tresilian, was executed, whilst the sentence of death passed on the rest was commuted into one of banishment; the legality of this proceeding was also maintained at the accession of Henry IV. This important event left behind it for later times the impression that the independence of a State tribunal required the judicial office to be strengthened by the power of the landed interest, which support was in process of time found in the Upper House. (c)

King's Bench had 180 marks; the chief justice of the Common Pleas 140 marks (Foss, iv. 227). The official costume was the same for the whole staff of judges. As to the very solemn oath taken by justices, cf. Foss, iii. 360. The justices were selected from among the number of the graduated advocates, i.e. King's serjeants. Even in the preceding period Foss reckons among 206 *justiciarii* about 125 men of the legal profession. Under Henry III. out of 100 *justiciarii* he only finds eleven of whom it may not be assumed that they have practised in some way or other as advocates. In this period it can in almost every individual case be definitely shown that the justices have been advanced to their position from the legal profession. In conformity with the old principles of a *judicium parium*, the justices receive the honour of knighthood, and usually even the higher rank *tantum baronetii* (Foss, iii. 362, 364).

(c) The personal responsibility of the judges was derived from their position as delegates of the King invested with his personal judicial authority. Their appointment is accordingly not merely as a rule subject to revocation (*durante bene placito*), but they are also subject to the King's personal penal jurisdiction, which was apparently preceded

by an inquiry by an assembly appointed for the purpose (Foss, iii. 262). In a very summary and hasty manner Edward III. proceeded to dismiss and arrest several justices (Foss, iii. 341) in the year 1340, and again five years later for a more serious cause (Foss, iii. 365). In later times disciplinary punishments had almost disappeared by reason of irregularity in the conduct of the business of the courts. But a more serious side to their responsibility showed itself in 10 Richard II. Two justices were at that time murdered in a popular tumult, and a third was executed for high treason. Robert Tresilian had allowed himself to be employed, agreeably to the personal wishes of the King, to bring about a counter-revolution. A defeated party sought for this purpose to gain the decision of the highest judicial authorities, that an ordinance formerly issued in conformity with the law was illegal, and "the authors of it guilty of high treason and punishable with death." The Lord Chief Justice, who had already shown himself servile to the power of the day, collected his justices in all secrecy and haste to deliver the required opinion. The *coup d'état*, however, completely failed; the Chief Justice fled, was apprehended, condemned by Parliament to death for

The ordinary course of the civil and criminal justice in individual decisions had after this time attained that steadiness and stability which was in keeping with the spirit of Magna Charta. The law to be applied has now the distinct character of "judge-made law." From the thirteenth century dates the definite distinction between *common law* and *statute law*. The latter is the law proceeding from royal ordinances and resolutions of Parliament; the former is that created by the blending of the Anglo-Saxon customary law with the Norman feudal system, and the older maxims in the judicial administration of the *curia regis* and the county courts. The further development is now found in the central courts. "The common law rests in the breast of the judges of the court of common law;" it is a judge-made law from the very beginning of this period, and in so decided a form that the authority of the law books very soon dwindles, while the collections of precedents, or year books, become the living source of law. To maintain the unity of this law, analogous principles are formed to those of the German common law: no customary right can maintain itself against the statute law; the custom must be *legitime præscripta*—that is, must have existed anterior to Richard I.; it must also be *rationabilis*—that is, practice excludes such customs as are in antagonism to the leading principles of the law of the land.

A natural effect of the institution of judicial benches was the development of a special legal profession. About the time at which the central courts became permanently fixed at Westminster, we find the first traces of inns of jurists, at first comprising students, advocates, and under-officers promiscuously, but still (like the courts of law themselves) on a great scale, and with a strongly prominent *esprit de corps*. In 20 Edward I. the first attorney's code was published; according to which the Chief Justice was to admit a certain number (about 140) of efficient "*Attornati et Apprentitii qui curiam sequantur*," and exclude all others. Under the name of Inns of Chancery, there then became formed small law schools for the preparatory study of the law; somewhat later

high treason, and executed on February 19th, 1388. The other justices were also put on their trial by the Lower House, in spite of their excuse that compulsion had been used towards them, and were in like fashion condemned to death and to confiscation, but the sentence was commuted into banishment. See as to these events Foss, iv. 3, 4, 102-108. The later judicial staff remained so far outside the great party feuds, that even at the

change of dynasty under Henry IV., Edward IV., Richard III., and Henry VII., the former justices were confirmed. Under Edward IV. only the two Chief Justices were excepted, of whom one was already a fugitive (Foss, iv. 380). The dread felt by the justices of a collision with Parliament is notably shown in their refusal to give any opinion as to the extent of the personal privileges of the High Court of Parliament in 32 Henry VI.

the practising advocates combine, and form the four Inns of Court that still exist. In Fleta's work we meet with professional degrees in *servientes*, *narratores*, *attornati*, *apprentitii*. A statute (4 Henry IV. c. 18), orders an examination of all attorneys by the judges, and a registration of their names upon a roll. About the same time the higher class of advocates begins to separate itself more decidedly from the lower class of attorneys, and to form in the four inns of court a sort of university. In conformity with the system of guilds there arises the degree of mastership, of *serviens ad legem*, serjeant-at-law, *doctor juris*; which is conferred by royal writ, and forms an intermediate step to the class of official judges. The serjeants are appointed as substitutes for the justices in the assizes, as such receive a salary, and are afterwards advanced to the bench. Two *Attornati Regis* for guarding the royal privileges are met with as early as the reign of Edward I. Towards the close of the period, after Edward IV., the two Crown advocates were distinguished by the titles of King's Attorney, and King's Solicitor. In 11 Edward IV. there appears for the first time the solemn official title of an "*Attornatus Generalis in Anglia cum potestate deputandi clericos ac officarios sub se in quacunque Curia de Record.*" (d)

(d) The development of a special legal profession is at once the cause and effect of the refined form of actions at law. It was impossible for the parties to conduct such actions in person. The clergy had formerly been the counsellors both in the household and the law-court; "*nullus clericus nisi causidicus.*" For many reasons the papal throne now wished for a less frequent employment of the clergy. Even Richard I. had been obliged to dismiss his Archbishop of Canterbury from the office of chief justice; and in the provincial councils it was determined "*ne advocati sint clerici vel sacerdotes in foro seculari.*" Class jealousy had a similar effect. The noble Normans had in quite early times enjoyed a certain education in the practice of the law; laymen of lower rank filled numerous situations as clerks, in the Exchequer, with justices, sheriffs, and bailiffs of every kind; and the Norman administrative law shows us that the laymen thus educated certainly had little more to learn of the *clerici*. Now, about the time that the central courts became established at Westminster, inns for lay-jurists began to be formed. Under Edward IV. a student in the inn required £28 yearly; the nobility sent their sons

thither "in order to keep them from vice, and to educate them in music, dancing, history, and other accomplishments." A modern compilation of all the historical records of the origin of the advocates' inns is given by Foss (ii. 200; iii. 46 *seq.* 370-390; iv. 195 *seq.*, 251 *seq.*). It is, however, impossible to form a clear picture from these fragmentary notices. In 18 Edward I. st. 4, there only appears the designation "*countour.*" In 38 Edward I. *countours*, *attournees*, *apprentis*; in 28 Edward I. c. 11, *countours* & *sages gents*. 14 Edward III. c. 16 calls the class of serjeants-at-law substitutes for the justices of the realm for the assizes. It was not until towards the close of the period that Fortescue gives us more connected information. At this time ten smaller inns of Chancery had been formed, side by side with which stood the four great inns, Lincoln's Inn, Inner Temple, Middle Temple, and Gray's Inn, which provided the higher education for the practice of the law. No one was to be admitted to the degree of serjeant-at-law "*qui non in predicto legis studio sexdecim annos ad minus antea complevit.*" (Fortescue). It was bound up with such expensive ceremonies, and imposed so many restrictions from considerations of honour

The procedure and the staff of the central courts still remain formally connected with the chancellor. From his office as *officina justitiæ* proceed the writs commencing actions, and all commissions under the great seal. As *clavis regni* the chancery of the realm is accordingly open at all times. The number of regular writs of daily use (*writs de cursu*) had increased to such an extent that in 12 Henry III. fifty-one of them were sent to Ireland. Five such *formulæ actionum* (*de recto, mortdauncestor, novell disseisin, de nativis, de divisis faciendis*) could even under King John be issued by the chief justice without reference to chancery. These writs are accordingly no longer writs of grace, but *formulæ actionum*, which are granted to litigants upon proper demand. Under Edward I. the assisting counsellors of the chancellor were also allowed to issue in plain cases new *actiones utiles* (writs *in consimili casu*), but in more difficult cases only after obtaining the consent of the members of Parliament learned in the law. (e)

V. The *jurisdictio ordinaria* thus formed does not, however, exclude a system which still continued in a restricted degree, viz. the system of special courts, a continuation of the Norman method of the administration of justice. These are the militia, the Court Marshal's, and the forest courts.

1. The military jurisdiction of the high constable and marshal had proceeded from the regulations for the feudal militia, and since the creation of hereditary feudal offices had under that name attained a fixed form, though only with a limited scope. Even in our day there exists in

upon the practice of an advocate, that it was frequently refused (Coke, *Inst.*, ii. 214; Foss, iv. 223), but was a requisite qualification for all justices of the King's Bench and Common Pleas. The mention of an *Attornatus Regis* begins with the commencement of Edward I.'s reign; in most years two *Attornati Regis* were spoken of (Foss, iii. 44, 45), both with a small salary of £10.

(e) As to the commencement of an action by writs, cf. Palgrave, *Privy Council*, pp. 16, 17. At the close of the Middle Ages the number of the admissible formulary writs *de cursu* had already considerably increased, as is shown by the treatise *de natura brevium*, dating from Edward IV. By 36 Edward III. c. 15 it was enacted that proceedings by parol and decisions of the courts should be in the English language; whilst the registrations and protocols of the courts should be couched in the Latin official language. A connected picture of the

practice as it existed under Edward I. is afforded by the law work of Britton, written in French, which has been republished in a critical edition (Nichols, "Britton," London, 1865, 2 vols.). This new edition regards Britton as a condensed adaptation to later ideas of Bracton, which must be placed after 1290, and is somewhat more recent than Fleta's work. As to the other sources of law of this time, cf. Biener, *Das Engl. Geschw. Gericht.*, ii. 286-298. From Edward II. date the collections of the decisions of central courts, which, under the name of Year Books, extend through two hundred consecutive years, in presence of which the use of the law books (notably those anterior to Britton) almost disappears. The criminal procedure is simple in comparison with the civil. The whole of the working time of the justices of the realm was at this period confined to the hours of the morning from eight to eleven o'clock (Foss, iv. p. 226).

the archives a roll of *placita exercitus regis* dating from 24 Edward I., in which the high constable and marshal presides in the name of the King. An application to it of the forms of the county jury could, of course, in war times be never thought of. However, in 2 Richard II. the Commons endeavoured nevertheless to extend the provisions of Magna Charta to this department also. They petitioned the King that this court should not decide on cases of treason and felony, "seeing that the said court decided according to the law of arms, and not according to the common customs of the country." In 13 Richard II. c. 2, the assurance is given that no dispute shall be dealt with therein, which can be dealt with in an ordinary court according to the law of the land, but only "contracts and other matters relating to records of arms and war, within and without the realm," reserving an appeal to the King. However, the right of the King remained undisputed to order in time of war military courts with summary procedure for all manner of offences to be held by the high constable or marshal, or their deputies. A *curia militaris* of this description is frequently mentioned under Henry IV.; it was continuously constituted upon French soil, and even in the commission appointing the high constable (Edw. IV.) the King commits to him: "*plenam potestatem ad cognoscendum et procedendum in omnibus causis de et super crimine læsæ majestatis, cæterisque causis quibuscunque, summarie et de plano, sine strepitu et figura judicii.*" Apart from an irregular use made of it in the violent times of the later wars of the Roses, the military jurisdiction in actual time of war continued as a constitutional institution down to the Petition of Right under Charles I. (1)

(1) The military courts contain the elements of a chivalrous martial law. The legal equality of the classes in private law, however, and the divided interests of the knighthood, did not allow of any further expansion of a special martial jurisdiction. But in consequence of the French wars and their contact with the nobility of the Continent, a collision of class feelings with the common law had unmistakably come to pass. Nobles and knights demanded the retention of the knights' court, at all events "in affairs of honour and for the maintenance of the degrees of rank;" especially for disputes touching arms, precedence, and other family distinctions; whilst the common law of the central and county courts did not take cognizance of these objects, and especially not of satisfaction for simple affronts. For a considerable

time longer the knights' court exercised a real jurisdiction; in it especially duels had a place for affairs of honour which, "for want of witnesses, could not be decided otherwise," as in the quarrel between Norfolk and Henry of Lancaster under Richard II. Even in the middle of the fifteenth century two cases occurred: in 1446, a duel between an armourer of London and his journeyman, under the authority of the High Constable and Earl Marshal; in 1453, a duel between John Lyalton and Robert Norres, on account of an accusation of high treason. At the latter the High Constable presided, before a vast concourse of people in Smithfield. But as a *jurisdictio extraordinaria* the court only enters *in subsidium* by writ, and in this weakened form is called a "court of honour." When the French wars had ceased, and the pretensions

2. The maintenance of the King's peace in the royal residence and its precincts was reserved, as well as the jurisdiction over the servants of his household. There existed for this purpose a court held before the Steward of the Household, and the Marshal as household officer, which within its sphere of action excluded all other courts. The principle of the jury was applied to it: in civil actions arising between courtiers the jury is only constituted of courtiers; in other cases a common jury is empanelled (3 Edw. III. c. 2). An appeal lies to the "King in his palace," which is delegated to the King's Bench. (2)

3. Lastly, the special administration of justice in forest cases was also reserved. The concessions made by the *Charta de Foresta* merely extend to the less rigorous exercise of the ancient rights of the King, without introducing the restrictions of Magna Charta. There remained accordingly in this province a purely administrative justice without a jury. Once every forty days the lower foresters assemble and form a forest court (court of attachment or woodmote) to lay informations as to offences against the forest and hunting laws, which were noted by the verderer. Thrice a year the verderers hold a forest court (court of swanimote) upon these informations and for the decision of disputed rights of pasture. The upper court of the forest for more serious cases is formed by two itinerant justices, the one travelling the whole of the north, and the other the whole country south of the Trent (*court of justice seat or court of the chief justice in eyre*). (3)

of the nobles had wasted away in the bloodshed of the wars of the Roses, the court, as a magisterial department, became extinct; for the spirit of the parliamentary and county constitution was antagonistic to its continuance. After the period of the wars of the Roses such writs were no longer issued, and the former court of law thus sinks down into a herald's office. Moreover, after Henry VIII., the hereditary office of high constable was not again filled (Coke, *Inst.*, iv. p. 124).

(2) The Court of the Steward of the Household was competent in disputes between the servants of the royal household and in trespasses within the precincts of the palace, even when only one of the parties is a royal servant; and in cases of debt and contract where both parties belonged to the royal household. The precincts of the palace extended to a twelve-mile radius from the royal residence. This jurisdiction was never subordinated to the King's Bench until in Edward III.'s

reign a writ of error before the King "in his palace" was introduced (Thoms' "Book of the Court," pp. 302, 303).

(3) For the administration of justice in forest cases there existed until Richard I. a *summus justiciarius omnium forestarum*, and then a commission of four *justiciarii* with under-officials. The *Charta de Foresta* provides for an exceedingly numerous staff of forest officials. In every great forest there are to be four verderers as supervising administrative officials and forest justices. Under them are twelve inspectors of forests (regarders) for surveys, investigation of contraventions of the forest laws, clearances, etc. Under them the foresters with the duty of preserving both wood and game, giving information against and prosecuting transgressors. Besides these there are rangers (gamekeepers), agistors (inspectors of pastures), woodwards (keepers of woods), stewards and beaules as court attendants and exe-



Besides these older special courts a new administration of justice proceeded from the newer administrative system of the permanent council: the equity jurisdiction of the Lord Chancellor, the Courts of Admiralty, and the penal jurisdiction of the Star Chamber, to which I shall refer in the next chapter.

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## CHAPTER XXIII.

### *The Permanent or Continual Council—The Court of Chancery.*

THE corporate constitution of the central tribunals appears as the stronghold of the modern judicial system, that pillar of the rising constitution, which as it gradually rose was strengthened by the consolidation of the county and municipal unions into fixed corporations. Beyond doubt there existed an intimate connection between both these formations and the fundamental laws of Magna Charta. The one is called forth and rendered effectual by the other; the one is a natural deduction from the other. These permanent elements of the political system, however, form only a firm encircling bond, within which the great sphere of the ordinary business of the State is reserved for the decision of the King. There is now formed from among the counsellors for this round of business a Continual or Permanent Council, which first took the form of a governing body, when under Henry III. a regency became necessary for the first time. After Henry III. had substituted for it a personal government with foreign favourites and subordinate clerks, the barons and the prelates demanded in opposition thereto that the great offices of State should be filled by "suitable" persons, and after a bitter struggle took the matters into their own

cutive officials. As head of the department there is a Chief Warden of the Forests. This administrative sphere was regarded in the Middle Ages as freed from the restrictions of the common law, and was entirely left to the royal ordinance. In the *Charta de Foresta* of Henry III. the heavy burden of the general suit of court at the sittings of the courts of the forest was abated. Some mitigation of the bloody punishments that were threatened was

obtained under Henry III. through the Assize of Woodstock, 1184 (limitation of capital punishment to the third offence, etc.). The popular complaints as to arbitrary afforestations continued for a long time, though the antagonism of the magnates was in later times somewhat lessened by the fact that they were allowed to participate to a limited extent in the privileges of the forest right.

hands. But though at that time the issue was in a violent party government, Edward I. from the standpoint of the monarchy recognized the demand as righteous, and carried it into effect. It is as a spontaneous creation of the monarchy that we now find, in addition to the Exchequer and the central courts of law, a continual or permanent council for the efficient despatch of State business, which discharged in joint deliberation the highest affairs of the State, and thus became the centre of the parliamentary system that was now beginning.\*

I. The functions of the Permanent Council may be compared with those of the cabinet council of our day. But we must not leave out of sight the comparative simplicity of the times, the separation of Church and State, and the hitherto personal character of the rule of the Norman kings. The following heads may be in some measure distinguished from one another :—

1. Advising the King upon the issue of ordinances in the general province of Government.

2. Resolutions as to war and peace, treaties with foreign powers, summons of the feudal and county militia, measures for the organizations of paid armies, and for their general direction.

3. Resolutions touching measures in case of national distress and tumult ; appointment of extraordinary commissions, and instructions for such cases.

4. Advising the King where the *jurisdictio extraordinaria* was to be exercised, which was reserved to the King for the most important cases.

5. Resolutions upon petitions of private persons, corporations, and counties, touching complaints of financial oppression, abuse of offices of trust, deficient legal protection, and applications for and grants of pardon. These form the ordinary current business of the council. In consequence of

\* The formation of the permanent council has received a new elucidation by the reprint of the protocols of the council in the work "Proceedings and Ordinances of the Privy Council of England, from 10 Richard II. to 33 Henry VIII.," by Sir H. Nicolas (7 vols. 8vo, 1834-1837); upon this was founded the monograph of Sir Francis Palgrave, "An Essay upon the Authority of the King's Council" (1 vol. 8vo, 1834), which for the first time attempted to give a consecutive picture of this political body and its relation to the Parliaments of the Middle Ages, but sometimes went too far in

the conclusions drawn. Hallam has turned these modern sources to account (against Palgrave, *vide* "Middle Ages," c. viii. 8 note). Among the older literature, the work of M. Hale, "Jurisdiction of the Lords' House of Parliament" (1796, 4to), is still valuable. The recent treatise of Dicey, "Privy Council" (Oxford Essays), is now out of print. The novelty of the formation of the Council can be perceived in Edward I.'s reign in the still unsettled designation, "*Continual Council*" (Nicolas, i. 8), "*Secretum Concilium*" (Heming, b. ii.), "*Familiare Concilium*" (M. Paris).

the malpractices of the *Viccomites* and local bailiffs, of the necessity which had arisen for the remodelling of many institutions that had suffered under the throes of former constitutional struggles and under the haughtiness of quarrelsome magnates, such was necessarily its ordinary sphere of activity; especially now that the Commoners in the national assemblies were soon to become the mouthpiece for national grievances. Throughout the whole of the Middle Ages, the Parliaments are regarded as assemblies "for the redress of wrongs and remedy of abuses." With each Parliament petitions flowed in, claiming every sort of relief, not merely in public matters, but frequently also in petty private affairs, from all classes of persons, and on all kinds of subjects. The "poverty of the petitioner," the power and the number of his opponents, and the inadequacy of the common law, form the ordinary motives for appeal to the council. Herein can be perceived the fundamental idea that "the King in council is there as the final resource for every grievance, which the ordinary tribunals are powerless to redress." (1)

For the discharge of this mass of business it was enacted (5 Edw. I.) that all petitions should in the first instance be examined into by the judicial officers to whose department they belonged; and that only matters of importance should be laid before the King and his council. In 21 Edward I. the King appoints "receivers of petitions," which were ordered to be assorted into five classes; (1) for the Chancellor, (2) for the Exchequer, (3) for the Judges, (4) for the King and Council, (5) such as have already been disposed of. In this manner they were to be "reported" to the King. The appointment of receivers for this purpose soon became an established institution, which is described in Fleta's law

(1) The sphere of action of the council may be best compared to a modern cabinet council, in which the whole of the business of the central government is comprised, so far as it has not been assigned to the courts for decision according to constitutional principles, or to the Church to deal with according to its independent rule. See the description which Sir H. Nicolas, vol. i. p. 1, gives of it. Its sphere of action is the same as that which the Norman kings informally filled by confidential persons and counsellors, whom they frequently changed. The progress of the age is seen in the corporate nature of this national body. Palgrave ("Privy Council," p. 34) rightly assumes that the council was looked upon as a properly constituted "court" for the

Crown vassals. As a matter of fact the clause of Magna Charta touching the *amerciaments* of the Crown vassals *per pares suos* was regarded as complied with, when the council fixed the fine. Towards the Exchequer, too, the competence of the council was not legally defined: at times important financial business was reserved to it. Under the regency of Henry VI., feudal wardships, consents to marriages, leases, etc., were reserved by the council to the Lords, including questions concerning lunatics, who were occasionally brought before the council that inquiry might be made as to their state of mind. In other cases it was merely accidental that sittings of the council were held under the roof of the Exchequer.

book as a "*Curia coram auditoribus specialiter a latere Regis destinatis*," "they who have not to decide, but only to make a report of what they have heard, in order that the King may determine what shall be done touching the parties." Under Richard II., when the council had already entered into more intimate relations with the *magnum consilium* of the peers, the petitions are divided into three classes; (1) bills of grace and offices, which must be answered by the sovereign in person; (2) bills of council, which the council may dispose of; (3) bills of Parliament, which may not be answered without consent of the Parliament.

The resolution on the report of the receiver could be made in one of three ways:—

(i.) Immediate decision, generally written on the upper margin of the petition by a member of the council: under Henry V. and VI. generally by the chamberlain.

(ii.) Appointment of a special commissioner to redress any extraordinary injury to the petitioner requiring a speedy remedy. This is a *delegatus a latere* to whom a commission of *oyer* and *terminer* was issued in the Chancery upon writ, or by a mere writing.

(iii.) Reference of the matter to the Exchequer, or other court, especially to the Chancery. From Edward I.'s time the answer "*sequatur in cancellariam*" was a frequent one, and given generally under the privy seal.

The rules of procedure of the council were themselves a subject of the royal right of ordinance, but under the house of Lancaster, for the sake of greater solemnity, were frequently issued from Parliament. For example, the regulations of the council of 1406 were issued in Parliament, and registered as an Act. Those of 1424 were annexed to the Act of Appointment. Those of 1480 were drawn up in the council, assented to by the lords, read in the presence of the three estates, and then signed by the council (Stubbs, iii. 251). (1<sup>a</sup>)

(1<sup>a</sup>) As to the oldest methods of procedure, especially the arrangement of petitions into groups, cf. Palgrave, pp. 23, 79. As to the form of the resolutions, we find that—

(i.) The immediate personal decision was comparatively rare, and even in the case of these marginal recripts it is frequently mentioned that they were issued "on report being made in the council." Henry V. often signed his decrees with his own hand; numerous royal orders occur also without signature (Nicolas, vol. vi. p. 214).

(ii.) The appointment of a special commissioner by a commission of *oyer* and *terminer* was a continuation of the

older personal administration of justice, and led to collisions with the ordinary jurisdiction of the central courts, against which the Parliaments began quite early to remonstrate. The stat. Westminster 2 (18 Edw. I.) already gives the assurance, that no writ of trespass *ad audiendum et terminandum* should be issued in any other manner than before the justices of one or the other bench, or before the other justices, except it be a heinous trespass which demanded speedy redress. All such assurances (*vide* note 3<sup>a</sup>) were, however, so equivocally and uncertainly framed, that they yet left room for the *gouvernement personnel*.

II. *The personal constitution of the council corresponds to this sphere of business.* It consists of the persons whose assistance the King requires for determining matters of the highest instance; to use a modern expression, the heads of the departments of State, with a number of persons, whom he has thought fit to summon to a continual deliberation on such matters. Foremost among the officials is:—

(a) *The Lord Chancellor*, and in addition to him the chief clerk of his office, the Master of the Rolls, as well as some higher clerks (reporting counsel), being the persons who at this period represent the most varied legal and official knowledge.

(b) *The principal members of the central courts, i.e. the chief justices and the other justices.*

(c) *The directing members of the Exchequer, the Treasurer and Chancellor of the Exchequer.*

(d) *The principal officers of the royal household, before all the King's Chamberlain, who continued for centuries a chief member of the council. Next to him the steward of the household, and after the administration of the royal court had become further subdivided, the treasurer of the household, the controller, and the maître de garderobe.*

(iii.) The reference of the matter to the Chancery (cf. Hardy, "Introduction to Close Rolls," p. 28) led to the Lord Chancellor's office becoming a separate court of law.

The later rules of procedure under Henry VI. are known in detail and instructive. The rules for the administration of the council (2 Hen. VI.) contain among others the following: The council shall not interfere in matters which are to be decided according to common law, except where one party is too powerful to enter the lists with the other, or for other urgent reasons; The clerk of the council shall select the bill of the poorest plaintiff, which shall be first read and answered; One of the King's serjeants shall be sworn, to lend his best assistance to the plaintiff, without fee, under pain of dismissal (Nicolas, vol. iii. pp. 149-152). A similar spirit is recognizable in the regulations of 8 Henry VI.; the council was to interfere "if their lordships found too much power on one side and too little on the other." The council had to hear, to deal with, to communicate, to appoint with reference to, and to decide upon, matters laid before it. Charters of pardon, grants of personages and offices, and other matters of grace and favour, belong to the King personally. On topics of

great moment and importance, it shall deliberate, but not pass final judgment without the King's advice. Where the number of votes in the council is equal, the matter must be laid before the King, and the decision left to him alone (Nicolas, vol. v. p. 23). In 8 Henry VI. c. 1, there follow certain orders for regulating the use of the signet, privy, and great seal, saving the prerogative (Nicolas, vol. vi. p. 185). In the Cottonian manuscripts, there are original decrees of the council (probably dating from 22 Henry VI.), which provide (*inter alia*) that "considering all such matters as pass through many hands are less likely to be decided to the prejudice of the King or of any other person, it has been found well that all bills to which the King assents shall be delivered to his secretary, in order that he may draw up letters under the royal signet to the Keeper of the Privy Seal, and thence from the Keeper of the Privy Seal to the Chancellor." Where petitions concern matters of justice, the King's decree is taken in order to send them to the council, which then assigns them to the proper court, except when the petitioners are unable to prosecute according to common law (Nicolas, vol. vi. p. 29).

(e) *The Keeper of the Privy Seal.* Now that the Chancellor had become a chief officer of the realm, the King was again in need of a cleric in the confidential position of a personal cabinet secretary. Under Edward III. such a one appears as a minister of State, with a formal oath of office (14 Edw. III. c. 5), under the name of Keeper of the Privy Seal; later known as Lord Privy Seal.

(f) *The Archbishop of Canterbury* as Primate appeared, conformably to the position of the Church, to be so essential a member, that in 10 Richard II. he submits a solemn protest, wherein he claims for himself and his successors in office the right of assisting at all the sittings of the royal council, be they general, special, or secret (Rot. Parl., iii. 223).

These are plainly the chief elements of the council. But yet a clear distinction between them was wanting in the time of Edward I., II., and III. As occasion required, lower officials were also summoned to attend the council, to give opinions and information, and to receive orders; such as King's serjeants, Chancery clerks, escheators, itinerant justices, and others. A definition of the ordinary members began to be made when the rival power of the parliaments first took cognisance of the constitution of the council. When differences of this sort first arose, the following were designated as members *virtute officii*: the Chancellor, the Treasurer, Privy Seal, Chamberlain, and Steward (Rot. Parl., iii. 73). These five were regarded as the chief members and managers of the current business. Moreover, during the whole of the Middle Ages there was no president of the council other than the King himself, to whom it is naturally open to honour a member with the temporary conduct of the business. For instance, in the latter part of Edward the Third's reign, the Bishop of Winchester was mentioned as "*Capitalis Secreti Consilii ac Gubernator Magni Consilii*." In cases of personal impediment, the regent of the realm was for this reason the natural president of the council, as in 1 Henry VI., the Duke of Bedford, and later the Duke of York.

The somewhat fluctuating form of the council became modified from the time when, under Richard II. and under the house of Lancaster, the estates of the realm began to take a more decided share in the Government. In these later times there appear seldom fewer than ten and generally a greater number of spiritual and temporal lords as members of the council; with them sit the highest officers of State, now as ordinary members, and no longer mingled with the under-officials who were occasionally summoned. The growing power of Parliament particularly aimed at subjecting the Lord Chancellor and Keeper of the Privy Seal, as the two bearers of

the decisive national seal, to a definite responsibility. In all material points this was attained under the house of Lancaster. In the eighth year of Henry IV. the King in Parliament agrees that, for the maintenance of the laws of the land, the Chancellor and the Keeper of the Privy Seal shall not allow any warrant, grant by patent, judgment, or other matter, to pass under the seal in their possession which should not so pass according to law and right, and that they shall not unduly delay those that must pass. Attempts to prosecute the Keeper of the Privy Seal were made as early as Richard II. Under Richard II. and Henry IV. the members were appointed annually, but their appointments regularly renewed, unless accusations of bad behaviour or petitions to be discharged from serving intervened. Their annual pay was graduated according to their rank, as were also the fines for neglecting to appear at the sittings. In a process of political crystallization, the purely personal *conseil du Roi* of the Norman kings had now become a department of State. (2) But as the body was too large and too heterogeneous in its constitution or varied business, delegations and commissions were issued, some of which form the nucleus of independent departments.

III. The commissions and delegations of the council were chiefly necessitated by the fact that more specially legal and technical questions came before the council, in the case of

(2) The personal constitution of the council has been ascertained by Nicolas from the protocols of the great council with more exactness than in former times. The Lord Chancellor is everywhere conspicuous as the principal personage for the formal procedure, though he is not president of the council, and by no means always the most influential person in it. The importance of the office of the King's Chamberlain is new: he is indebted to the influence of the magnates in the council of the realm for his improved position. In 15 Edward III. he expressly swore to obey the laws of the realm and the Great Charter. In 1 Richard II. he became a member of the regency. His functions are to endorse petitions, to formulate royal immediate decrees, and communicate with Parliament. In 11 Richard II. and frequently later he was impeached by the estates. The position of the Keeper of the Privy Seal, as he was first called in 13 Edward III. c. 5, is also new; later he appears as Clerk of the Privy Seal (2 Richard II.); as Guardian de Privy Seal (Parliament

Rolls of Henry IV.); as Lord Privy Seal (34 Henry VIII.). This, however, did not exclude laymen and ecclesiastics from being also employed as secretaries of the King, and on confidential special commissions, in which sense "King's clerks" occasionally occur under John and Henry III. As to the older constitution of the council, cf. Palgrave, p. 20, *seq.*; Nicolas, vol. i. p. 3. The statements of the latter relating to the period of Henry VI. have been made very carefully. The royal council consisted in 2 Henry VI. of twenty-three persons: the Duke of Gloucester, the Archbishop of Canterbury, four bishops, the Chancellor, the Treasurer, the Keeper of the Privy Seal, the Duke of Exeter, five earls, four *sires*, and two *messieurs*, Thomas Chaucer and William Alyngton (Nicolas, vol. iii. p. 148). The salaries, fixed according to rank and length of service were: for the Archbishop of Canterbury and the Bishop of Winchester at 300 marks; for a bishop, earl, and the lord treasurer 200 marks; for a baron and banneret £100; for an esquire £40 (Nicolas, vol. iii. 155).

which it seemed proper to form a narrower committee for their treatment and decision, or rather for passing an opinion which was to influence the ultimate decision of the King. The personage most suited, by reason of his position and his under-officials, for the discharge of these more intimate functions was the Chancellor. Hence the sub-commission was most frequently composed of the Chancellor and the justiciaries of the two central courts, and hence are issued "*decreta per curiam cancellariæ et omnes justiciarios*," or "*decreta cancellarii ex assensu omnium justiciariorum et aliorum de Regis consilio*." In the first century of this period even formal proceedings are somewhat frequently taken before the Chancellor and the judges in Westminster Hall. Commissions of this description take the place of the extraordinary judicial commissions of prelates and barons which, in the former period, the Norman kings were wont to appoint for the Crown cases reserved.

As a permanent institution there next arose a kind of committee for appeals from the Exchequer. As this did not remain subordinate to, but was co-ordinate with the central courts, an appeal could only lie to the King; that is, to the "King in council." It was a matter of delicate questions of financial law, which were well suited for a special council of men well versed in matters of business. Hence a commission was at first formed of the Chancellor, Treasurer, and two justices; but it was subsequently laid down in 31 Edward III. stat. 1, c. 12, that the Chancellor and Treasurer should meet together and have the documents laid before them, summon the justices and other experts according to their best judgment, demand reports of the barons of the Exchequer, alter the Exchequer decree according to their opinion, and remit it to the Exchequer for further consideration.

Still more important was the creation of a separate *Court of Equity*, which proceeded from this system of delegations. Certain petitions and questions touching property were, from their peculiar nature, not so well adapted for hearing before the justices of the realm as before the Chancellor, who might still be looked upon as the prime authority and chief representative of a more universal juristic education. In course of time deficiencies and hardships were conspicuous in civil justice, which could not be redressed in the ordinary course of justice, either because they were ill-suited for a jury, or because they could not be decided according to the fundamental principles of the common law (such as fraud, accident, trust, that is, *actio* and *exceptio doli*). Hence there sprung up a "remedial jurisdiction," *supplendi et corrigendi juris civilis causa*, analogous to the prætorian jurisdiction, in which the Chancellor proceeding according to *æquitas* (that is,



principally according to the principles of the Roman and canon law), directs his reporting secretaries or Masters, and then decides *per decretum*. The most frequent cases of this equitable jurisdiction from Richard II. to 37 Henry VI., were cases of conveyances to uses *inter vivos*; but even in those early times the sphere of action was probably a wider one, and from the very nature of the jurisdiction, the office of Chancellor continued until the close of the Middle Ages to be filled by ecclesiastics. (8)

It is quite conceivable that these functions occasioned conflicts with the Parliaments, which are chiefly aimed at the civil jurisdiction of the Chancellor, but partly also at the penal jurisdiction exercised by the King in council, the abolition

(3) The delegations of the council and the equitable jurisdiction of the Lord Chancellor have one and the same origin. The establishment of sub-commissions of the Council was primarily an administrative measure, and not a constitutional institution. It was only after the lapse of time that such creations, owing to continually arising needs of the same kind, adopted the character of magisterial departments. It is only juridical pedantry which would at once make of these *ex tempore* commissions formal departments of State. Upon the authority of Hale a so-called "*concilium ordinarium*" or "*concilium legale*," was said to have existed, being composed of the Privy Council, certain great officers, judges, and others. But neither the expression "*concilium ordinarium*" nor "*legale*" occurs in the official records; nor do we find any regulation as to its members or procedure. We can, accordingly, no more make a magisterial department of this institution than of the shifting judicial commissions of the Norman period. Under Edward III., for example, proceedings were frequently assigned to the "Chancellor, Treasurer, and others of the King's council" (Reeves, iii. 386). In 44 Edward III. a difficult case was heard before "the Chancellor and all the justices of the King's Bench and Common Pleas" (Foss, iii. 337). Even in earlier times, under Edward II., Westminster Hall was named as the place at which the Chancellor holds his sittings; this place was called "*Magnum Bancum*" (Foss, iii. 177), and the sittings were described as being "*in plena cancellaria*" (Rot., cl. 25, Edward III.). The Admiralty Court was an instance of such delegations of the

council, which was an outcome of a special commission of the King, with a jurisdiction in the ports, and over offences committed on the high seas; perhaps existing as early as Edward I., with powers more limited in later times on motions of the estates under Richard II. Another delegation is formed by the Court of Requests under the Lord Privy Seal (Spence, "Equitable Jurisdiction," i. 351). The practical need for a remedy for the elusiveness of the common law, led to the later jurisdiction over "equitable obligations," the fulfilment of which was left by the common law to the conscience, whilst the common wants of life and the existing views of law necessitated a magisterial compulsion for their fulfilment (Reeves, iii. 188). From the time of 2 Edward III. the assignment of the matter with this view under the formula "*sequatur in cancellariam*" becomes more and more frequent, and soon also with the further addition " *fiat ulterius justitia in cancellaria; non potest juvari per communem legem, veniat in cancellaria et ostendat jus suum; fiat ei justitia secundum legem cancellarie*" (Foss, iii. 178; Hardy, "Introduction to Close Rolls," p. 126). From the time of Richard II., or at all events under the house of Lancaster, the jurisdiction over Uses stands prominently forth as the principal object (Reeves, iii. 381). But beyond doubt the special jurisdiction of the Chancellor was also a delegation of the King's council (Palgrave, Privy Council, 25; Spence, "Equitable Jurisdiction," i. 709-716; Hallam, "Middle Ages," note x.). England had thus attained to the necessary completion of its system of private law, which was accomplished in Germany by the reception of foreign law.

and clear definition of which were equally impracticable. In 25 Edward III. the Commons protest against any one being brought before the council on account of his freehold, or on account of such suits as affect life and limb, and against any one being fined by informations laid before the council or one of the ministers, unless such legal procedure shall have been "formerly customary." In the answer to this the extraordinary criminal procedure was expressly reserved; "*mes de chose que touche vie ou membre, contempt ou excesses,*" it shall remain as formerly customary (Palgrave, Council, 35). It was apparently agreed that the assignment of ordinary actions to the courts was to be understood "*salvo jure regis,*" that is, with reservation of extraordinary *causæ majores* to the King; but the Parliaments wished to co-operate in this. In 27 Edward III. the Commons themselves expressly consent to an extraordinary criminal procedure against clerics who appeal to the papal chair; in the statute even imprisonment for an indefinite time, "during the King's pleasure," is threatened, as well as forfeiture of lands and personal property, of those who should refuse to answer for such a contempt before the King, or his council, or his chancery, or before his justices (Palgrave, 39). In 42 Edward III. c. 3, upon a complaint raised by the Commons, it was indeed promised in general that none should be required to answer before the courts except by regular judicial procedure. But the extraordinary power of the council remained unaffected by this, and in turbulent times, such as followed under Richard II., it was exercised with a wide scope by the council and the chancery, for the maintenance of peace. But in civil procedure the Chancellor's writ of subpoena gave rise to a new petition (13 Richard II.) "that neither the Chancellor nor the council after the close of Parliament should issue any ordinance against the common law, and the old customs of the country, and against the statutes that had been passed or that were to be passed in that Parliament, but that the common law should take its course without respect of persons, and that no judgment once delivered should be annulled but by due course of law" (Palgrave, 45). The answer ran with the usual ambiguity, to the effect that the former customary procedure should remain in force, "so that the King's royal right be assured," and if any one felt aggrieved "*qu'il monstre en especial, et droit lui soit fait*" (Palgrave, 70). Protest was not raised against the extraordinary judicial power of the King in general, but only against such proceedings on the part of the council, without sanction of Parliament. In the stat. 17 Richard II., protest was only made against citations before the King's council and the chancery based

upon false information (Reeves, iii. 194). In 1 Henry VI. the Commons complain of the citations before the council and the chancery, in matters "in which a legal remedy is afforded by the common law;" in like manner a writ of subpoena was not to be issued until the justices of one or the other bench had first tried and attested the fact, that the plaintiff had in this case no remedy at common law (Palgrave, 50, 51). In 8 Henry VI. jurisdiction was reserved to the council in quite indefinite terms "so often as their lordships should find too great power on the one side, and on the other too great weakness," or if they should otherwise find "some reasonable cause" (Palgrave, 81). Finally, in the stat. 31 Henry VI. c. 2, the offences were specially mentioned by name for which the council was wont to summon offenders before it, and the procedure defined that was therein observed, especially the more rigorous courses, by which disobedience to ordinances under the privy seal or under a writ of subpoena were to be prosecuted as *contemptus regis* (Palgrave, 84, 86). This extraordinary penal jurisdiction was in later times exercised in the Court of the Star Chamber, and was, therefore, frequently designated by this name. (3\*)

IV. The position of the **Lord Chancellor as head of the Chancery department** forms in a certain sense the keystone of the constitution of the council. As the great office of the Chancellor had remained the common bond of the central courts, it also serves as *clavis regni* for other business of the King's council. All solemn decrees of the King in council here received their authoritative character. The *Protonotarius* of the Chancellor managed the preparation, despatch, and registration of the State treaties in the treaty rolls. The rest of the State business was recorded in the charter, patent, close, and fine rolls. The most numerous administrative documents belong to the province of the *Rotuli literarum clausurarum*, "Close Rolls," so called because they were issued

(3\*) The opposition of Parliament to the jurisdiction of the King in council begins from the time when Parliament had become consolidated into a united body (Hallam, note xi.; Spence, "Equitable Jurisdiction," i. 848-851). In a decision which afterwards became famous, the "Chamber Case" (Croke's "Report," vol. v. c. i. p. 168), the judges acknowledged "that the court of Star Chamber had existed long before the proclaiming statute 3 Henry VII., as a very high and honourable court." The above evidence shows how far this assumption was well founded. There here remained a field

of action for the administrative powers, in spite of the advance of definite legal arrangement in the political rights of the realm. The practice of the chancery succeeded better in defining for itself more exactly the different branches of its civil jurisdiction, as to which Spence ("Equitable Jurisdiction of the Court of Chancery," vol. i. 334 *seq.*, 420 *seq.*, 435-683, 692-716) affords us the most comprehensive survey. A controversy as to the respective advantages of "Bench" and "Office" had already begun within these narrow limits during the Middle Ages.

with the seal under cover, in contradistinction to the *litteræ patentés*, which were addressed to all faithful subjects. Here, as elsewhere, centralization and the transaction of business by means of writing mutually influence each other. In the preceding period royal orders were still sometimes given by word of mouth in the Exchequer, even in judicial matters. Now writing became the unconditional rule, and the importance of the great seal at the same time increased. Apart from charters, which are publicly issued in Parliament, and in which the mere "sign manual" was for a long time retained, the use of the great seal is regarded as essential for all writs; in it the development of the English State from the *gouvernement personnel* is symbolized. From the time of Henry III. it is really the *clavis regni*, the faithful companion of the King, even in a foreign land. As the history of the great seal is thus identical with that of the most important State documents, Sir H. Nicolas began to write its biography (Nicolas, vol. vi. p. 148, *seq.*). The order to use the great seal can be given, either by word of mouth, or in writing; but a document only becomes a solemn State Act when the great seal has been actually affixed. In cases of the King's absence, a duplicate of the great seal was given to the Chancellor for writs *de cursu* which were issued by him upon his own responsibility, but this duplicate was always given back after the occasion for its use had ceased. For non-official correspondence the privy seal was at first used, and when this also had attained a political meaning, the signet. As early as 28 Edward I. c. 2, the assurance was given that no common law writ should be issued under the privy seal. The struggle against the privy seal which commences from that time marks the struggle of the estates against the *gouvernement personnel*. (4)

(4) The Lord Chancellor as head of the chancery attains greater importance with the development of the use of the seal (Nicolas, "Proceedings," vol. vi. p. 148). The most important *Rotuli* which have been partly published by the Record Commission are the following:—

(a) *The Charter Rolls*, containing the royal grants to cities, boroughs, and corporations, rights of market, and the like. The collection begins with 1 John, and runs to 7 Henry VIII., after which date such grants were made in the form of patents. See *Rotuli Chartarum*, 1199–1206 (ed. Hardy, 1837, *et seq.*).

(b) *The Patent Rolls*, containing the grants of offices, lands, titles, and the

like, which were issued in open documents with the great seal affixed. They begin with 8 John. See Hardy, "Description of Patent Rolls in the Tower of London," 1835.

(c) *The Close Rolls*, containing royal mandates, letters, and writs, principally rescripts addressed to private persons on private matters, closed on the outside with the seal. They begin with 6 John. See *Rotuli litterarum clausarum*, 1204–1227 (Hardy, vols. i. ii.).

(d) *The Fine Rolls*, containing the grants of the Crown fiefs, with the dues for alienation, *relevia*, consent to marriage, etc. See Hardy, "Rotuli Finium," and above, p. 171.

With few exceptions the great seal cannot be used without the express

The staff that was necessary for the discharge of this multifarious judicial and chancery business, consisting of a chief as well as of a number of reporting counsellors or "Masters in Chancery," and clerks, received its form in this period. Among the numerous staff of clerks the chief of the office now stands out conspicuously as the *Custos Rotulorum Cancellariæ Domini Regis*. He was first described by this name in the Patent Roll, 14 Edward I. Under Edward II. this Master of the Rolls was specially appointed by the King, took a special oath of office, and was inducted into his office with great pomp (Foss, iii. 327). The appointment was very generally made for life, or "*quamdiu bene et fideliter se gesserit in officio*" yet sometimes otherwise "*quamdiu nobis placuerit*" (Foss, iv. 4). From this time he was regarded as Vice-chancellor, and was ranked in the stat. Richard II. c. 2 in precedence to the justices of the central courts. (5)

order of the King, either (1) verbally, or (2) by writing under his signet, or (3) by writing under the privy seal addressed to the Chancellor, or (4) by writing under the signet addressed to the keeper of the privy seal, who thereupon communicates the royal pleasure to the Chancellor by a warrant under the privy seal. The origin of written instruments sealed with the great seal is given in Palgrave ("Commonwealth," vol. i. p. 147; Privy Council, 18); for the continuous history of the great seal under the separate reigns, cf. Foss ("Judges," Index, *vide* Seal). A juristic survey of the royal writs according to the difference in their legal nature is given in Coke, Inst., ii. 40.

(5) The staff of the chancery now takes a firmly organized form with the growing importance of the office in the administration of the realm. The list of the chancellors of this period is given by Foss (Judges, vol. iii.). As early as Edward II. the title "*Cancellarius Angliæ*" occurs twice; and the honorary title "Lord Chancellor" from this time comes into gradual use. As a rule the chancellors are still chosen from the higher clergy; under Edward III. among seventeen chancellors were four archbishops and eight bishops, but on the other hand also one knight and four professional jurists. An at-

tempt of Parliament to thrust out the clergy from this position, failed, and the lay chancellors were always after a very short time replaced by prelates (Foss, iii. 320). The higher chancery clerks now received the title of "*Magistri*" or *Masters in Chancery* (Spence, vol. i. 359 seq.), for as these clerks without exception belonged to the lower clergy, the custom arose of applying their title of rank as *Magistri* to their office. Towards the close of Edward III.'s reign, we find the title of "Masters" used in the documents containing their appointment (Foss, iii. 334). In the company of the Chancellor they are also active in Parliament, in which they usually officiate as *receivers of the petitions*, whilst the class of "triers" was formed of the prelates, barons, and justices. More numerous still was of course the staff of the *clerici de secundo gradu*, as they are now termed, in contradistinction to the *Magistri* or *clerici de primo gradu*. As head of the department for the registration of the State treaties stood the *Protonotarius*, whose treaty rolls from Edward I. to 22 James I. are still in existence. The whole of the clerks inhabited an inn near the royal palace, and received their salary and supply of provisions from the royal household.

## CHAPTER XXIV.

*The Parliament of the Prelates and Barons.*

FROM the time of Edward I. there were connected with the permanent council, as the seat of the central government, certain periodical meetings of notable prelates and barons, who became united with the King's council, into a "great council;" and then separated themselves as an Upper House from what was afterwards the "House of Commons." Edward I. on ascending the throne found a condition of things existing in which prelates and Crown vassals had already for a generation past exercised their right to impose scutages and aids, and had been summoned to deliberate upon important resolutions of the realm. Convinced that such participation in the central government was henceforth unavoidable, he made this concession without any reserve, and in the course of his reign extended it beyond the original design. The functions and constitution of these parliamentary assemblies assume a form from which at length proceeds an hereditary peerage of secular lords.

I. The *concilium* of the prelates and barons formed, from Edward the First's time, a constitutional link in the administration of the realm, and as a periodical council, was ordinarily convoked four times a year, so that the magnates met together with the royal permanent council, and during the period of meeting formed a "great council," in which those who were summoned in virtue of office, ecclesiastical dignity, and property, took their places side by side. We have here to do, not with a mere estate of the realm, in which a privileged class of landowners claim a right to be heard, but with a constant and regular participation of the magnates in a political system with fully developed military, judicial, police, and financial powers. The competence of the *Magnum Concilium* is bound up with these prerogative rights. The unlimited royal powers are now exercised under the constitutional co-operation of the magnates; the portion of the government which remains indefinite and informal is the residue of personal rule. Reserving its indefinite authority, the principal functions of the great council which still survive in the Upper

House as it exists at the present day, may be already separated off into a quadruple sphere of action: a court of law, a tax-granting body, a State council for the administration of the realm, and a legislative body.

1. Under Edward I. its position as a court of law is prominent. The parliament in this reign, is pre-eminently intended to be a judicial assembly, to which the other functions are annexed. In this sense (which was also that intended by the barons in the Provisions of Oxford) Edward I. convokes four times in each year a *parliamentum*, and he only departed from this rule afterwards in very turbulent times. In this sense in later reigns the motion was repeatedly put and agreed to, that at least once in each year a parliament, that is a judicial assembly of the magnates, shall be holden. Its models, the *Echiquier* of Normandy, and the Parliaments in France, and the Germanic fundamental idea by which the secular government wears the character of a court of law, were all of some influence upon its creation. The competence of this court is bound up with the King's right of taking the most important and difficult cases to his court. The current law suits were certainly now, indeed, assigned to the corporate central courts, as they had formerly been to the county courts. But this delegation did not annul the royal right of personally directing the court in extraordinary cases (above, p. 406), as was the case in the German Imperial Constitution, where a court of officials sat in addition to the imperial court, and a parliamentary revision of the body of official judges was reserved. It has never been constitutionally determined which *placita* belonged to the jurisdiction of Parliament, for the King never renounced his power of reserving the most important and extraordinary cases to his personal appointment of a *judicium parium*; and the estates themselves were interested in upholding these powers, from the time when their right of co-operation had been constitutionally established. Hence civil and criminal cases might in the first instance, as well as in the higher instance, be brought before Parliament, if the matter appeared of sufficient importance. As extraordinary cases of the highest importance, the following presented themselves:—

(a) Complaints against erroneous decisions of the central courts, which were admitted by a royal writ of error, and now came before the King in council, for which the *Magnum Concilium* offered itself as the higher, more powerful, and more illustrious body. In the year books 29 Edward III. 14 (Hale, Jurisd., 41), the justices plainly declare it to be the prevailing opinion that the Permanent Council is not the place to upset the decisions of the central courts. The assistance

of the great council in this matter proceeded tacitly from the necessity which had arisen for a higher authority. (1)

(b) Impeachments of members of the Parliament itself. From the moment that the great council had attained a certain stability, the demand was raised to recognize it as the *judicium parium* of its own members. The demand for a special *judicium parium* for the Crown vassals had hitherto, merely on account of the unequal position of the hundreds of lesser vassals, never taken a definite form. Now, since an organized body and an external limitation existed, the demand for a court of peers for this narrow circle had become practicable and unavoidable. It had been to a certain extent prepared by that ordinance of Henry III. which had exempted the great barons from the ordinary suit of court in the county court. It appeared the more justifiable in proportion as the great council began to invite the justiciaries of the central courts to act as deliberating members at the meetings for delivering its legal decisions. It was natural that the lords should object to recognize their assistants of the legal profession as a *judicium parium* over their own persons. The new expression, "*piers de la terre*," occurs for the first time as an official term, in the judgment passed on the De Spencers in 15 Edward II.: "Accordingly we peers of the land, earls, and barons in the presence of the King do declare that," etc. In the proceedings against Mortimer, and in the disputes with Archbishop John of Canterbury, the demand is still more definitely marked. In 15 Edward III. it was raised, upon the motion of the barons, to a statute, to the following extent, "that no peer of the land should be condemned to the loss of his temporal possessions or to arrest or imprisonment unless by verdict of his peers in Parliament." (a)

(1) The parliament is now the *judicium parium* of the estates, an institution which the magnates had long endeavoured to establish. The expression "parliament" was at the close of this period pre-eminently used in this sense (Parry, "Parliaments," xi.; Peers' Report, vol. i. 169-171). In accordance with Fleta's text-book, the Parliament was under Edward II. described as a constitutional tribunal, "*coram Rege et Concilio suo in præsencia Domini Regis, Procerum et Magnatum regni, in Parlamento suo*." A change had been made in the selection only; whilst in former times the royal judicial commissions were based upon personal selection out of many, it was now the class of the magnates that had become formed into a body, which the King in his character of chief magistrate con-

sulted. What once, in the action against Thomas Becket, appeared as an extraordinary convocation, is now the regular method of its composition. The Peers' Report acknowledges that this change had been tacitly effected, that in Rotuli 1 Edward III. all spiritual and temporal lords were already regarded as the natural constituents of this court; but that the time when this change came about could not be exactly determined (Report, v. 296, iv. 376). Only in this sense the assurance was given in 4 Edward III. that parliaments should be holden annually, or more frequently if necessary (Peers' Report, i. 302); for neither the Lords nor the Commons were interested in a frequent convocation of tax-imposing assemblies.

(a) A hundred years earlier, when, in the action against the Earl Marshal,



(c) Next follow accusations against the royal great officers, which with due regard to the depositaries of power and law, could not be sent for trial before justices, as being mere advisers of the royal council. They are sent as extraordinary *placita* to the "King in council," which latter for these cases could only be "the great council." This course, in addition to imparting to them a just importance, certainly in early times indicates the mark of violent party passion. With the increasing power of the great constitutional body of the realm, this jurisdiction extended into all three directions; and whilst retaining the forms of a council, became the extraordinary supreme tribunal of the realm. (1<sup>b</sup>)

2. The same body is at the same time a tax-granting assembly for the *scutagia* and the extraordinary *auxilia* of the Crown vassals. It had been firmly established by the precedents under Henry III., that the baronage granted these taxes through a committee of notable prelates and barons, who being convoked by royal writ as greater taxpayers represented the mass of the lesser. Edward I. respected this

the claim for a court of peers was raised, Bishop Peter de Roches declared that there were no peers in England of the same kind as those in France, and that the King, by means of his judges, had a perfect right to sit in judgment upon his foes. But after the spiritual and temporal lords had for a whole generation year by year appeared at these judicial assemblies, it was natural that they should begin to be regarded as a more select peerage, as "*piers de la terre*." The claim for such a peers' court for the members of the great council was moreover based on the old privileges of office of the Norman period, which had always accorded to the members of the higher courts an extraordinary and separate right of appearing before their own judicial department, exchequer, etc. In 15 Edward III. the barons bring in an emphatic motion in respect hereof, and on the opinion of a specially appointed commission of four bishops, four earls, and four barons, together with the *sages de la ley*, a statute was issued in the same session to the effect that "no peer of the realm, crown officer or other should be arraigned on account of his office, condemned to the loss of his temporal possessions, thrown into prison or arrest, tried or judged, except by the award of his peers in Parliament" (Peers' Report, I. 314, 315).

(1<sup>b</sup>) But in this question indefiniteness as to limits was and remained the

heritage left by the Norman *Curia Regis*. In Mortimer's case (3 Edw. III.) the magnates protest that they are not bound to sit in judgment upon Simon de Beresford, because he is not their peer. On the other hand, they caused Thomas de Berkeley, a Crown vassal who had been summoned by writ, in accordance with custom, to be condemned by a jury of "*militēs coram rege in pleno parlamento*" (cf. Reports, i. 300). The uncertainty, too, of the forms of procedure, derived from the Norman judicial commissions, lasts for a long while. In 11 Richard II. 5, lords appellant move articles of impeachment for high treason (for these incidents, see Parl. Hist., i. 410-440). In recollection of the forms of the old administration of justice, the court is styled "council" (Peers' Report, App. iv. 729) and their verdict "award," which only becomes final by the assent of the King. After the opposition had taken the helm, the commons on their side in 21 Richard II. impeach the archbishop, Thomas Arundel, of high treason, who by "award" in Parliament was condemned to banishment. Other peers were accused by the lords appellant, and condemned to death and banishment. The older resolutions of 11 Richard II. were for the most part annulled; in 1 Henry IV. the last resolutions were declared null and void, and the former ones (11 Richard II.) revived.

right of the vassals. But a deeply felt violation of it in the twenty-fifth year of his reign, with the refusal of the clergy to pay taxes, combined with war, financial distress, and discontent in the country, compelled him in the *confirmatio chartarum* (25 Edw. I. c. 6), to agree to a still wider concession, which, as a principle, restricts the grant of all *auxilia*, *scutagia*, and *tallagia* to the common consent of the prelates, barons, and commons in Parliament assembled (cap. 25). Under each subsequent reign this concession was confirmed, extended, and protected against violations. This periodical right of granting taxes gives the great council an unassailable position, and a continual support to its other claims; but this right had to be early shared with the representatives of the communities, which from this point were gradually gaining a preponderance. (2)

3. The *Magnum Concilium* is the supreme deliberative council of the realm for the most important measures of the Government. Primarily for decrees of war and peace, on account of the important military rank of the great barons; but just as much for internal affairs also. Its functions are thus far the same in principle as those of the continual council (p. 399). Naturally the most important were reserved for the great assembly; but on that very account the least important were not excluded. For these indefinite functions the assembly pre-eminently bears the name of "*concilium*," and not of "*parliament*." But the regular recurrence of the assembly gave the magnates an ever-increasing influence upon the Government in the following principal points.

First of all a participation in the current business of investigating and replying to petitions. As the convocation of the parliaments was marked by the presentation of the greatest number of petitions, it was natural to claim for the referees (receivers and triers of petitions) that they should be appointed from among the estates themselves. In the stormy time of the "*Ordinances of Ordainers*" (5 Edw. II.) this claim was established; yet the procedure in respect of it varies according to the spirit of the Government. In 14 Edward III. 1, c. 5, it was decreed, that from thenceforth there should be chosen in every parliament one prelate, two earls, and two barons, invested with the royal commission and authority to hear on petition all complaints of delay or violations of justice, and to bring before the next Parliament

(2) In the straits of war in 25 Edward I. the raising of an aid from all landowners of the value of £20 for the campaign in Flanders was ordered by the ordinance of the King in the council (Peers' Report, i. 220, 221). The uni-

versal opposition to it now led to the *statutum de tallagio non concedendo* (25 Edw. III. c. 5, 6), the origin of which is mentioned below, Chap. xxv. sec. 1.

all difficult cases suitable to be heard there. This is a kind of perpetual committee of Parliament, like that still existing in the Upper House. As late as the middle of Edward the Third's reign, chancery clerks, royal justices, and peers are arranged together as triers and auditors, the first as reporters, and the latter only for the purpose of preliminary inquiry.

Further, the council acquired an influence upon the appointment to the great offices. In quite early times the King declares his willingness to appoint such persons as are "agreeable" to the great council, yet with the reservation of his right of appointment (Rot. Parl., iii. 258, 349). Frequently, too, the great officers are sworn into the great council. Influential and skilled members of the great council acquire in this position a natural claim to a summons to the administrative council, which under the circumstances could hardly be refused. During the minority of the king, the *Magnum Concilium* naturally exercises a paramount influence upon the formation of the executive council, as at the accession of Edward III., Richard II., and Henry VI. But also under a sovereign who actually ruled, in constitutional conflicts the magnates frequently force the ruling council of the realm upon the King. For instance, in 9 Edward III. the Earl of Lancaster, as president of the council, undertakes the government with the promise on oath that he will conduct no national affairs without the advice of the council, and that every member of the council who gives advice which is prejudicial to the realm shall be removed in the ensuing Parliament. In 12 Edward II. it was resolved that the King should have two bishops, one earl, one baron, and a baron or banneret of the Earl of Lancaster, as coadjutors, and all that could be done without Parliament should be decided with their consent, and all that was done without this consent was to be regarded as null and void, and set right by resolution of the peers in Parliament. The great party struggles after Henry VI. end in periodical appointments, depositions, and condemnations of the executive members of the Continual Council by the *Magnum Concilium*. Under the house of Lancaster the greater part of the executive council of the realm consists of members who owe their position to the high estimation in which they are held in the great council. (3)

(3) As a deliberative assembly of the King, the *concilium* of the magnates has the same indefinite powers as the executive Continual Council. All national affairs were, under certain circumstances, settled with their advice as the circumstances of the realm and the monarchy demanded. There appear

here the same occasional encroachments and rebuffs as in the provincial diets of the German states. As early as 4 Edward I. "prelates, earls, barons, and others of the King's council, justices, and *regis fideles* in Parliament" resolve on war against Wales. In the course of the later wars, and

(4) The *Magnum Concilium* becomes in this manner the law-giving assembly of the realm. The statute of Marlebridge at the close of Henry the Third's reign formed the most important precedent for the regular deliberation of the King with his magnates on important and extensive acts of legislation, and one which follows close on former isolated precedents. Without renouncing his traditional right of ordaining, Edward I. had, at the beginning of his reign, introduced a deliberation with his *Magnum Concilium* upon all important laws which involved a change in civil and criminal, as well as in judicial procedure. From the statute of Westminster 1, until late in the reign of Edward III., the great council is the ordinary body for the discussion of laws, with reservation of the occasional ordinances of the King in council, which, after the end of Edward the Third's reign are no longer sufficient to alter laws which had been passed in full Parliament. This legislative position, which was in harmony with the national and indestructible legal conception of a legislation *consensu meliorum terræ* (above, p. 82), naturally fell to the prelates and barons, so soon as their position as a supreme tribunal and council of the realm and as a tax-granting body had been definitely established. Their predominant influence is also visible in the language of the statutes, in which, since the time of Edward I. and Edward II., the French language, as the tongue of the upper classes, begins to oust the official Latin. After 3 Edward II. a change in the phraseology was introduced, which, under the name of Parliament, meant sometimes the highest *judicial*, and sometimes the *legislative* assembly of the realm. The latter meaning became the leading one under the following reigns. In addition to the great council, Edward I. began to summon representatives of the counties and towns, merchants and others, to such deliberations as affected the narrower sphere of the Commons (cap. 25). This right began to be

in the disputes with the papal *curia*, they were very frequently asked for their consent. Where petitions were to be considered, they were summoned in cases where a legislative act or a special procedure was needed for the purpose of redress, whilst those which were to be discharged in the ordinary course of law and administration, only came before the chancellor, judges, and council (Peers' Report, i. 245). From this point of view the great council participates also in the delegations. The extraordinary civil and criminal jurisdiction of the council was repeatedly favoured by the

*Magnum Concilium*, but with the modifying circumstance that the lords frequently came into conflict with the permanent council as to their participation in it. In an address of the discontented magnates in 10 Richard II., it is expressed that "the King should assemble the lords, nobles, and commons once in each year in his Parliament, as being the highest *curia* of the realm, in which all equity should shine as clear as the sun; and in which both poor and rich should find a never-failing shield and protection by the restoration of peace and quietness, and the removal of every kind of wrong." In

shared also with the Lower House as the influence of that house in the province of taxation increased. (4)

But in all these four directions there continues, in the course of the period, an ascendancy of the *Magnum Concilium* over the executive council of the realm; so that towards the close of the period, the continual council appears occasionally as a committee of the great council. The struggles between the monarchy and the magnates, which were fought out under Henry III. in the barons' war, become now a struggle between council and parliament.

II. The constitution of the parliament of the magnates had been roughly sketched out by precedents down to the close of Henry III.'s reign. After Simon de Montfort's parliament had failed, Henry III. had again adopted the customary method of summoning by royal writ his bishops and abbots, his earls and barons, that is to say, a selection of the latter, to the deliberative assembly; and this order of things continued during the century of the three Edwards. The nature

21 Richard II., on motion of the commons, a committee of twelve lords was appointed to try, answer, and despatch various petitions and matters which needed to be discharged after the close of Parliament. It was the arbitrary acts of this committee that brought about the fall of the King (Parl. Hist., i. 482-498). Under Henry VI. an anomalous epoch of revolutionary excesses begins.

(4) In 3 Edward I. the statute Westminster 1 was passed "with the consent of the temporal and spiritual lords of the *communitas*," by which phrase, as under Henry III., the whole number of the vassals summoned to the Parliament is meant (Report, i. 173, 174). The most important legislative acts in the following generation were passed with the concurrence of the *Magnum Concilium*, but as yet without the co-operation of the county delegates, and of the towns. For example, in 13 Edward I., the statute Westminster 2, *de donis conditionalibus*, and the confirmation of Magna Charta, "*habito super hoc cum suo concilio tractatu*" (Report, i. 194). In like manner the form of expression was still retained which called the assembly (even without any summons of Commons) a "*Parlamentum*" (as in 27 Edw. I., Report, i. 237). In 28 Edward I. the statutes, in spite of the presence of the commoners, were only passed with the advice of the great council (Report, i. 238, 239). In

3 Edward II. mention is made of the common consent of all bishops, earls, and barons "*in pleno parlamento*"; in 4 Edward II. the consent in full Parliament is spoken of immediately after the counties and towns have been dismissed (Report, i. 261). In 6 Edward III. the clergy and the commons were dismissed, whilst the prelates and those of the council remained behind for further deliberation (Parry, 97). Later in the same year, after dismissal of the commoners, the prelates and barons remain (Parry 99, 100). However, from this period parliaments without the assistance of the commoners are more rarely held. The assembly in 20 Edward III. (27th March, 1346), was still a *Magnum Concilium* of that kind which, in a marked manner, was called a "convocation" (Peers' Report, App. iv. 557). An assembly of this character is met with also in 27 Edward III., perhaps also in 45 Edward III., and once again in 2 Richard II. (Rot. Parl., iii. 55; Peers' Report, i. 320). Occasionally we still meet with laws which have only been discussed with the justices or the continual council, such as the statute of Acton Burnell, 11 Edward I. (Report, i. 190, 206-208); the statute *de prisonibus*, 23 Edward I. (Report, i. 217); the ordinances for Ireland, and the statute *de prerogativa regis*, 17 Edward II. (Report, i. 286).

of the council continued regularly to affect the selection of the persons that were to be summoned.

To the parliament as a judicial assembly, only spiritual and temporal Crown vassals could be summoned; because otherwise the principle of the *judicium parium* would have been violated.

To the parliament as a tax-granting assembly for the purposes of the *scutagia*, the *tenentes in capite* were necessarily summoned. But on this mere question of taxation the greater vassals might be regarded as representing the lesser.

Of the parliament as a deliberative assembly, in addition to the smaller council, the ecclesiastical dignitaries were customary members, and the most illustrious Crown vassals, to a certain extent, members by birth. Moreover, since experience in military and political business was here of great moment, there could be no objection to summoning to the council illustrious men without Crown fiefs, and even of foreign family (such as the Beaumonts and Grandisons), as can be proved to have taken place in a few cases. The qualification for a foreigner by grant of an immediate knights' fee was not hard to attain.

Lastly, for the parliament as a legislative assembly, a selection of the most distinguished men (*meliores terræ*) was from time immemorial the rule. But the more that in the course of time, the business and the official staff became consolidated, the more did this consolidation lead to a legal definition of qualification on a well-balanced average, in the same way as all formations of estates of the realm can be ultimately reduced.\*

From this point of view three groups, viz: the spiritual lords, the temporal lords, and the members of the council, were summoned to the great council.

The *first group* is formed by the spiritual lords, who according to time-honoured custom take the precedence; archbishops, bishops, abbots, priors, and the heads of the religious orders. From the first it can here be perceived, that the two arch-

\* The qualification for parliament is known with tolerable accuracy from the preservation of the parliamentary writs since 23 Edward I., and from their being printed and elucidated in the great works of Prynne (1659-1664), and Dugdale (1685), and in the Reports on the Dignity of a Peer. The First Report has been, on account of its importance, reprinted at four different times (1819, 1820, 1823, and 1829). In like manner the continuations and completions (vols. ii.-v.)

contain exceedingly important matter at the end of the list of lords created. Parry (Parliaments, 52-54) gives a table of the temporal lords. I have given a complete tabulary statement of the number of the prelates, magnates, and members of the permanent council summoned to attend each parliament from 11 Edward I. to 1 Richard II., in the second edition of my "Engl. Verwaltungsrecht" (1867, vol. i. pp. 382-387).

bishops, and nineteen bishops must be regularly summoned in their double character of heads of the Church and great vassals of the Crown. Wherever these summonses are imperfect, it arises from vacancies, or from personal absence or temporary impediments; or the summons is for smaller deliberative assemblies, for which a narrower selection had been made. The number of the abbots appears for a long time to vary, much according to the object of the summons. Many of those summoned deprecate the expensive and burdensome honour, and assert that they are not bound by virtue of their possessions to pay suit of court to the *Curia Regis*. After 15 Edward III. it was acknowledged in a number of precedents that those were to be excused from obeying the summons "who did not hold by barony, but only in frankalmoign." From that time the number of the abbots became more and more definitely fixed at about twenty-five. In consequence of the occasional summons 122 abbots belonging to different monasteries were, however, summoned at one time or another. Still more fluctuating was the summoning of the priors and heads of the three ecclesiastical orders. Of the priors, only a small number were summoned on each occasion, and after 15 Edward III., the non-possession of a Crown fief was recognized as a reasonable excuse. But in consequence of frequent variations, forty-one priors were summoned, of whom only two can be regarded as regular attendants. (1)

The *second group* (the temporal lords) embraces, in the century of the three Edwards, the earls and the barons. The

(1) The prelates who were summoned comprise first of all the archbishops and bishops. Where the question is one of the grant of aids, the summons is as complete as possible, and during the vacancy in a see, the representative in the spiritual office (*i.e.* the Keeper of the Spiritualities) was called upon. Occasionally the Archbishop of Dublin was also summoned. The number of the abbots appears to have been gradually fixed at about twenty-three or twenty-five; only where the granting of a subsidy or a crusade or the like, was to be debated, a greater number was periodically summoned. In 15 Edward III., two abbots and two priors were excused from attendance, because they did not hold by barony, nor anything whatever *in capite*, for which they would have been bound to come to the parliaments and councils (Parry, 112). In the same year several others also were excused from appearance, because

they only held in frankalmoign (Parry, 113). (A case of this kind occurs as early as 12 Edw. II.). This appears from that time to be treated as an established reason for being excused. Still more indefinite are the summonses addressed to the priors and heads of the orders. The latter disappear owing to the abolition of the ecclesiastical orders and for other reasons, so that at last only a fixed number of two priors remained. In the first century of this epoch the writs of summons for the most part required appearance in person or by proxy. The abbots particularly were excused, when grants of taxes were to be made, in the event of their sending a procurator (Parry, 68). But sometimes the sending of proxies is expressly forbidden, as in 6 Edward III.; and in the course of the period the demand of appearance in person at the deliberative assembly becomes more and more strict.

earls are still the acknowledged heads of the Crown vassal-dom, although their dignity is only based upon patent, and not upon the feudal possession of a county. The small number of lords thus characterized appears to have been regularly summoned from the first nearly in the same way as the bishops, so that the omission of any can be explained by minority, absence, or personal hindrance. In later times there is added to these the very small number of dukes, marquises and viscounts, of like character, appointed by patent. On the other hand, the leading principle for the summons of the barons is very hard to determine. The customary method under Henry III. (according to the origin of all *concilia optimatium*), consisted in the King's inviting the most illustrious and the greatest feudatories to represent all the rest in the law-court, the council, and the tax-granting assembly. This point of view still left a wide open field. For instance, Edward I. summons to an assembly of the realm at Shrewsbury in 1283, 110 earls and barons, whilst to Westminster in 1295, only 49. The citations under Edward I. vary between 40 and 111; under Edward II., between 38 and 123; under Edward III., between 24 and 96; under Richard II., between 29 and 48; under Henry IV., between 24 and 87; under Henry V., between 20 and 32; under Henry VI., between 15 and 42; and under Edward IV., between 23 and 37. In the first century of the period the change is so frequent, that 98 lords were summoned on one occasion only; and 50 lords only two, three, and four times, without their names ever occurring again. Others were summoned in their own lives, but their descendants were never summoned. Great prominence being given to the grant of taxes, weight was certainly laid upon financial considerations, and such Crown vassals only were at first regarded as paid the great *relevium* of a hundred marks on change of possession. Further, a regard to the hereditary great offices was decidedly necessary, although the high constable and the earl marshal were only specially summoned as such after 51 Edward III. Unmistakable regard was also paid to certain great families. According to the purpose and place of summons, and according to personal confidence, there could be summoned round a fixed and determinate nucleus of about thirty barons, a number two or three times as great; and in the whole course of the Middle Ages there occurs not a single case in which the barons have refused a place among them to any one thus summoned. But the possession of a great Crown fief, with all its inherent importance with regard to military service, taxation, sub-vassals, and authority in the county, was necessarily to be considered in the summons, so far as the King



was interested in having the mouthpieces of the Crown vassals in his council. Husbands of heiresses were generally summoned; owners of parcels of land, where a partition had taken place, were sometimes summoned and sometimes passed over. Beyond these considerations the century of the three Edwards never advanced. (2)

The *third group* of the *Magnum Concilium* was formed by the members of the council. Not only the oldest modes of summoning, and the object with which a deliberative assembly was holden, but also certain recorded events prove that originally the executive members of the council voted in Parliament as such. In 20 Edward I. the *Rotuli* prove that

(2) The group of the temporal lords comprises in the first century only the earls and the barons. Under Edward III. the dignity of a duke was first created for the princes of the royal house, and after 24 Edward III., it became customary to place such a duke of royal blood, or the Prince of Wales, at the head of the persons summoned. After 10 Richard II. there are frequently added to these one or two marquises; after 23 Henry VI. also one viscount; in 31 Henry VI. three viscounts. The difficulty lies only in the number of the so-called barons. The Crown vassaldom was at all times unequally composed of great lords, simple landowners, and owners of small parcels. Instead of the impracticable universal summons, and the equally impracticable election, there remained accordingly only the royal selection by writ. To the stormy national assembly in 49 Hen. III. Simon de Montfort had only summoned his adherents, five powerful earls, and eighteen barons, among them probably many lesser ones (Peers' Report, iii. 106, *seq.*). After the restoration of the royal authority, Henry III. naturally summoned a meeting of his faithful followers. This event has been rightly described by an old historian, whom Coke cites from Camden, "*Statuit et ordinavit, quod omnes illi comites et barones Angliæ, quibus ipse rex dignatus est brevia summationis dirigere, venirent ad Parlamentum, et non alii, nisi forte Dominus Rex alia brevia eis dirigere voluisset.*" But it is wrong to regard this as a new statute; it is only the description of the original condition of things (Peers' Report, i. 395; iii. 114). And so it continues in the century of the three Edwards. Without reckoning anomalous smaller de-

liberative assemblies, the number of summonses under Edward I., II., and III., varies between 24 and 123. We cannot, therefore, doubt that the summons by writ in this century carried no hereditary right to a seat (Peers' Report, i. 325, 326; iii. 117, 265). But the difficult question remains still unsolved as to what other principles the procedure acted upon. Martial efficiency alone cannot have been decisive; and just as little did legal distinctions exist in feudal tenure. With regard to the grants of taxes, and the frequent mention of tenure "by barony" among the abbots, it appears probable that the financial point of view was predominant; that is, a special regard was had to "baronies," which, according to the rating of the Exchequer, pay the great *relevium* of a hundred marks. It seems that in the century of the three Edwards a body of about thirty barons became fixed as an average number, with the reservation (1) that the tenure by barony did not as yet give a legal title to a summons, and (2) that on the other hand lesser tenants could be also summoned out of personal confidence, and occasionally even such as did not hold any fief of the Crown. As a rule the writs of summons insist upon a personal appearance; but the temporal lords were for a still longer time allowed proxies, particularly to represent them at acts of taxation. In 35 and 36 Edward III., two anomalous assemblies occur, to which seven countesses and three baronesses were summoned, with the demand made upon them to let themselves be represented by "trusty men." The question here, which at all events was expressly mentioned in the latter year, was the special one of furnishing armed men for the campaign in Ireland.

under the *Concilium Procerum et Magnatum*, the chancellor, the justiciaries and the higher officials of the council, as such, are included (Peers' Report, i. 206-208). Even for the grant of taxes and the *judicium parium*, the right of voting in this capacity could not well be denied to the lowest Crown vassal. But just as unmistakably the united influence of the great prelates and lords in the great assembly soon asserted its ascendancy over the mere bureaucratic element. The first shock to the position of the mere officials had been given by the Statutes of Ordainers (5 Edw. II.). But the more decisively the idea of a "peerage" among the lords who were summoned came into prominence, and in 15 Edward III. attained a legal recognition, the more usual it became to summon the prelates and the great feudatories, who belonged at the time to the council of the realm, in the ranks of the other peers, because this had begun to signify both politically and socially a higher position. The membership of the council becomes gradually absorbed by the members of the great council, who now understood their position as forming a unity. Accordingly as members of the council the chief justices, the justices, and the councillors of the second and third rank were now only summoned by special writ. The justices in most cases appear merely as the assistants of the lords. With regard to taxation and the jurisdiction of peers the fusion of the peers in council and the peers in Parliament appears perfected; it is quite different, however, as to the deliberative and legislative assembly, in which the continual council, being still a *concilium in concilio*, forms, as Hale calls it, the administrative body under the personal direction of the King. The subjects of deliberation were prepared in the smaller council; the proceedings conducted by officers of the council; all *conclusa* recorded by officers of the council; all decrees resolved subsequently *discussed* in the council (until Henry VI.); all sittings took place in the council chambers of the royal palace, and the servants were ordered to attend from the royal household, as is the rule to this day. The regular sittings of the permanent council were only periodically interrupted by these plenary assemblies of the estates of the realm "*ad ardua negotia*." The convocation of the notables for this purpose may (according to Palgrave's appropriate expression) be called the *terms* of the council, corresponding to the terms of the courts of law. That the great council under Edward I. appeared thus to its contemporaries, is proved by the words of Fleta (ii. 2), which co-ordinate it with other departments or *curiæ*, as "*Curia Regis in Parlamento*." (8)

(8) In its original position the executive council is an integral element of Parliament. In harmony with the Peers' Report, Parry (Parliaments, 116)

III. The development of the heritability of the temporal peerage from these conditions becomes gradually discernible in a few symptoms, under the dynasty of the house of Lancaster. Here internal causes were at work, which in every process of political formation take an outward shape when the substance is already finished. It was the personal importance of the great lords for the State which silently decided this question. For the military service of the State a great vassal with his warlike followers was of quite as much importance as a small county, and this importance became greater owing to the French and Scotch wars. For taxation the baronies, which paid the great *relevium* of a hundred marks, and £100, connected as they were with periodical subsidies, profitable wardship, and incidental feudal dues, had as much weight as a small county, and more than that of the majority of the small market towns, which were already summoned to send burgesses to Parliament. In war as in the council, the great lords are personally a prominent element, which is more and more firmly established by their meeting together in person to discuss the "*ardua negotia regni*." This annual meeting, this customary discussion of the great business of the State gives them that experience, that importance, and those qualities which engender the justifiable feeling of a birth-membership, which at the same time has its root in their local position. With the development of the county militia, they became also the skilled leaders of the national array. With the institution of justices of the peace, after 34 Edward III., they took the head of the police control, and the quarter sessions, that is to say, of a great portion of the criminal justice and internal administration of the country. Their eminent personal in-

remarks upon 18 Edward III.: "The council seems always to have been present in Parliament, and every important act of the King in Parliament appears to have been sanctioned by the advice of his council. The meetings of Parliament were still considered as meetings of the King's select council, at which the lords and commons as the great council of the King, for legislative purposes, and for granting aids, and for their advice on extraordinary occasions, were summoned to attend" (cf. Report, i. 317). The statements respecting the members of the council who were summoned are, however, for the most part exceedingly indefinite, so much so that the higher, middle, and lower officers are confused together. In 28 Edward I. the justices of both benches, the itinerant justices, the barons of the Exchequer and "others

from the council" are mentioned; in 1 Edward II. thirty justices and others of the council; in 2 Edward II., "thirty-five of the council;" again in 2 Edward II., sixteen justices *et ministri*; in 3 Edward II., seven of the council and others; in 6 Edward II., sixteen justices and sixteen clerks of council; again in 6 Edward II., "forty-two of the council;" in 14 Edward II., "thirty-two judges and of the council." The justices, masters, and clerks of the council were often expressly mentioned; after Edward III. very frequently a number of King's serjeants (Foss, iii. 370). Whilst the writs of summons addressed to the magnates run "*cum cæteris pælatiis tractaturi*," those addressed to the justices leave out "*cæteris*," and thus express that the officers, as such, do not stand upon an equality with the peers.

fluence in the neighbourhood of their residence and their estates, is increased by their prominent position as the greatest tax-payers wherever land-tax, income-tax, county-tax, and local-tax was to be paid. Their local influence reflected upon their position in the great council, and their position in the council upon their local influence. The aggregate of such conditions becomes at all times bound up with tenure. According to the common law succession, the whole of these customary duties and this customary position pass to the eldest son or other heir, and only to him. The right of the kings to summon by their writs those whom they choose out of hundreds, could no longer ignore such claims. The feeling of the equality of this position had already become so strongly developed in the party struggles under Edward II., that the statute 15 Edward III. formally acknowledges those summoned by writ as " *pares regni*," and thus legally severs them from the great number of the other *tenentes in capite*. The distinction that subsisted between the greater and the lesser vassals in army, law-court, administration and taxation, at length, after a struggle that had lasted for centuries, attained legal recognition. The house of Lancaster was now enabled primarily to support its usurped throne upon the recognition of the body so constituted. The legality of the present political government was established by the mutual recognition of King, Lords, and Commons; and if this recognition was to mean anything, it had to proceed from a body constituted according to old custom, and not from an arbitrarily summoned number of partisans. The council of the prelates and barons accordingly from that time attained a fixed form; the number of those summoned became smaller and more constant in its attendance, and the element of the new members who were summoned merely out of personal confidence becomes reduced. Frequent deliberations upon military matters as well as military merits had also caused a number of "bannerets" to be summoned; but for these new members also, the writs of summons are more and more regularly issued. Although the royal right of personal summons is never given up, yet it silently assumes the shape of a permanent attribute of a permanent body.\* The question was simply one of giving legal form to what had been accomplished *de facto*.

But this legal form could not be deduced from the mode of enfeoffment by the crown and the writs of summons hitherto in vogue. The summons by writ could not, being a single act of invitation, express or found a permanent right. Just as little could the peerage be attached to fixed and determined estates, for then every lesser Crown vassal might

\* Cf. *infra*, the note to this chapter.

have raised like pretensions, and every purchaser and new acquirer of such an estate would, by virtue of the alienability of the English fiefs, have been able to lay claim to a peerage, and the royal right of summons would have been materially restricted. In every respect this was not intended. The development to which the State had attained had gone beyond the idea of the older feudalism, which under Stephen had combined the *Constabularia* and the *Marescalcia Angliæ* with certain estates. The suppression of manorial jurisdiction over independent estates, and the legal equality of the common law for all classes, rendered such a relapse impossible. The new legal form in which an hereditary estate of the realm and nobility by birth could attain recognition, was only that of a royal patent or a charter. After the Conquest the sole higher title of nobility, that of the earl, was based upon patent; from Edward III. downwards, a ducal dignity was also created by patent; from Richard II. that of a marquis. The dignities which were conferred after 10 Edward III. upon princes of the blood royal, were creations of a purely personal character, as princes of the royal family did not hold any fiefs whatever of the Crown. The precedence of the royal house and the higher dignities could not possibly be disputed by the lower ranks of the peerage. According to the principle of this title of nobility, in 11 Richard II. John de Beauchamp of Holt, Crown vassal of the knight's fee of Kidderminster, was appointed in consideration of his services and noble descent, Lord Beauchamp, Baron of Kidderminster, in hereditary possession for himself and the heirs male of his body, with all the rights, etc., of a baron. Since during the hundred years preceding this, certain barons, to the exclusion of the rest, had been summoned to Parliament, nothing else could be meant by the newly conferred "rights" than primarily such a summons. The title "*Baro*" being thus recognized as an hereditary title of nobility, its claim like that of other titles of nobility to a summons to Parliament was legally acknowledged. Much as this first creation was opposed to the wishes of the magnates, yet it finally was decisive as to the legal rank of the peerage. The Crown vassals who had been hitherto summoned by writ, came thus into a new position. Now that the newly "baronized" favourites claimed to be an hereditary estate of the realm, a similar claim could not be denied to those older and more illustrious barons who were ordinarily summoned to attend. The style of "baron" became accordingly a legally recognized title of nobility for barons of the realm. There existed in the fifteenth century two modes of summoning to the peerage: (1) by patent, for dukes, marquises, earls, viscounts and patented barons, legally

recognized as hereditary by patent : and from the middle of Henry VI.'s reign to the present time this method has become more and more the usual one ; (2) by writ for unpatented barons "by custom." This title by custom was in the fifteenth century hereditary for the older and more eminent, but not for others. Mere personal summonses became rare even under the house of Lancaster ; under the Tudors, they entirely ceased ; and under Elizabeth the courts interpreted a summons by writ to be hereditary, "by virtue of custom." In harmony with the character of a personal nobility, in 20 Henry VI. the right of the peers to be judged by the Upper House was also extended to their wives, and widows ; but beyond this it did not go. Thus took place the most difficult birth of any hereditary nobility in the European world ; but it was a most well-earned, and therefore a durable nobility.

NOTE TO CHAPTER XXIV. — *The origin of the heritability of the temporal peerage* is the subject of a long-standing dispute, perpetually renewed, because in the process of building up the State the result took a form decided by the reciprocal and active influence of numerous factors, whilst jurisprudence, heraldry, and the political and social party views of the State only take cognizance of the individual and external elements of the phenomenon. The Peers' Report rightly regards the recognition of a legal peerage as the first step towards the formation of an hereditary national nobility, beginning with the judgment against the De Spensers in 15 Edward II., in which, however, none of the bishops took part, a circumstance which was afterwards used, with other reasons, for declaring the sentence null and void (Parry, 85). In the same way, in 4 Edward III. the earls and barons, as peers of the realm, tried Mortimer and his accomplice. At the same time the protest is made that they were not bound to sit in judgment upon "others than their equals." Whilst *Magna Charta* recognizes a *judicium parium* only in the sense of a judicial fellowship (in which sense John granted even the Jews a *judicium parium*), there now springs into life the new claim of the " *pares terre* ;" that is, of a fellowship of rank different from the *pares* of the county. This is legally recognized in 15 Edward III., the decisive act by which the barons of Parliament separate themselves from the other *tenentes in capite*, as a nobility of the

realm. This class privilege extends also to the time during which no Parliament is sitting, and later even to women and widows. The Peers' Report (i. 313, 314) acknowledges the importance of this act to its fullest extent. A further weight is laid by the Report upon the rules of precedence as laid down in 5 Richard II. c. 4, by which temporal and spiritual lords are legally mentioned as a class distinct from the knights. More decisive was the succession of the house of Lancaster, the legal title to which depended upon the recognition of this body. Under Henry IV., in the action against the Earl of Huntingdon, a further formal concession was made when the King deputed the Lord High Steward as his representative to hold the Peers court, and thus introduced a piece of the ceremonial of a *feudal cour de baronie*. Accordingly, the number of the Upper House under the Lancastrians became more uniformly fixed, and owing to its limitation to the most distinguished members, smaller, in harmony with the tendency of a favoured class. In noticing the very small number summoned in this period, we must remember that many were often absent in foreign wars. The martial tendency of this era introduced into the writ of summons the titles appertaining to the feudal array. In 51 Edward III., and in 2-5 Richard II., besides the barons, one or more *chivalers* are spoken of. The style of *sieur* is more rare. Under Henry VI. a new form of expression begins to be employed. In 3 Henry VI. the

nineteen barons summoned to Parliament were described as seventeen *chivalers*, one *miles*, one *magister*. From 6-9 Henry VI. all barons are styled *chivalers*; in 18 Henry VI. twenty-three *chivalers*, Baron de Greystock "and others" were summoned; in 27 Henry VI. twenty-five *barons chivalers*, nine *barons milites*, four *barons domini de*. This distinction between *chivalers*, *milites*, *armigeri*, and *domini*, continues until the close of this reign, and under that of Edward IV. The legal and practical equality of the temporal barons accordingly did not exclude degrees in their military rank; and it was only by very slow degrees that the title of "baron," like that of earl, marquis, etc., became an established title of nobility in the modern sense of the term. The title "lord," on the other hand, does not designate a dignity created by the Crown, but is only a title of courtesy for numerous other offices and dignities. In general the concession of a peers' court, according to the spirit of the royal prerogatives, does not as yet exclude the arraignment of peers in extraordinary cases by justices with a jury, without the legality of the proceedings being called in question. Against the nobles, too, the continuance of a personal right residing in the King to constitute a court in extraordinary cases was still asserted. This was done most frequently in case of the prelates. In 25 Edward III. the Primate in the name of the clergy presents a petition to the effect that since the archbishops and bishops hold their temporalities of the King *in capite*, they are so far "*piers de la terre*," in the same way as other earls and barons. But this spiritual peerage did not arrive at full maturity, for the clergy laid claim to the far more valuable right of a special ecclesiastical jurisdiction, and claimed the far more extensive privilege of clergy, having almost completely severed themselves from the temporal constitution.

The legal form for the heritability of the temporal peerage is creation by patent or charter, which definitely declares the heritability of the dignity. The "creation" of new barons can only date from such a grant; for the "summons" by writ to each separate session had not in itself the character of a "dignity" conferred. The arbitrary modern expression which speaks of a creation of peers by writ, is only a

source of confusion and dispute. But it is remarkable that for a length of time the higher creations by patent were proclaimed "in Parliament." In 6 Edward III. the Prince of Wales was appointed Duke of Cornwall, and in like manner six new earls in 6 Edward III., "by common assent and council of the prelates, earls, barons, and others of our council in Parliament." The question here was not of the granting of new fiefs, but of personal dignities; thus we find in 36 Edward III. a prince of the blood created Duke of Clarence, though such a dukedom had never existed (Rep., i. 326). Various acts of this sort occur between the years 1337-1414, and the later jurisprudence asserted that such an appointment was to be regarded as proceeding from the "whole legislature," without perceiving that if this had been the case the peerage would have become an exclusive guild. But the proclamation of solemn acts of the feudal lord in the "*cour de baronie*" was an old feudal custom, and the so-called "consent" to them is a remnant of the acclamation of the bystanders in the popular court, which in no case was a condition of the validity of the transaction. Hence can be sufficiently explained that it was the creation of the highest dignities which took place in Parliament, and that occasionally other lords were created out of Parliament without mention being made of "consent," and that this form subsequently fell again into disuse. Concise discussions on this point are contained in Sir Harry Nicolas' "Report on proceedings on the Earldom of Devon" (App. ix.). The later procedure proves that the kings did not allow their right of free appointment to be in any wise limited by a right of Parliament to "consent." The patent of appointment defines at the same time the manner in which the dignity shall descend, which is sometimes framed narrowly, and sometimes extended to embrace all the legal heirs of the body. Upon this are based the variations of heritability which remain to the present day. But after heritability by patent was made the rule, and the number of the new "barons by patent" increased from generation to generation, it was impossible, having regard to the legal equality of the peerage, to put the original stock in a lower position than the new. The older mem-

bers who were continuously summoned could now claim an hereditary right by writ, "by prescription," as was also assumed by the Peers' Report (i. 342), with the very just remark that the newer creation "by patent" could not possibly have appeared as the better and more advantageous method, if there had ever existed a peerage by virtue of the tenure of certain estates i.e. a barony by tenure (Rep., iii. 119).

It was not until the power of nobility had made progress under the house of Lancaster, that this old feudal conception comes so far into prominence that in 11 Henry VI. the earldom of Arundel was directly claimed and recognized as a "barony by tenure;" so that the habit arose of assuming the existence of a mode of tenure "by service of attending the legislative assemblies," which, with all the deductions made therefrom is historically and legally erroneous (Peerage Report, iv. 269, 270). The seats of the lords in Parliament were based upon custom within this body, and formed so far a special corporate customary law or law of Parliament. In 11 Richard II. the ecclesiastical and temporal peers accordingly claim "as their liberty and franchise that all cases of high nature, concerning the lords of Parliament, should be awarded in Parliament. For that the realm of England never was or shall be ruled by the civil law; nor was it their intent that a case of so high a nature as this appeal should be tried by the course, process, or order used in inferior courts," and this claim was willingly acknowledged by the King, but did not succeed in establishing any deviation from the principles of the common law. Accordingly the justices in 7 Henry IV. made a distinction between the right to the name and title of a peerage, and the right to a seat in Parliament. The latter they urged was an exclusive question for the King and the peers; the former, on the contrary (being a private claim of family right) was a common law point, and belonged to the jurisdiction of the ordinary courts of law (Nicolas, "Proceedings," iii. 57, seq.). But as to the peers who were summoned by writ, the practice of Parliament accepted the important limitation, that the writ certainly did not confer an hereditary peerage and an hereditary nobility, where the individual thus summoned had not really

taken his seat by virtue of the writ—a maxim which was finally established in the case of Edward Nevill, in 8 James I. The appointment by patent was in other directions expressly and repeatedly recognized by the tribunals as a personal dignity, apart from any real connection with any definite landed estate, and it was particularly declared by Lord Justice Holt that this barony by patent forms "a title of dignity and parcel of the name." The long list of the later peers was created by patent, and the mere summons by writ has long since fallen into disuse, except for a special case. In 22 Edward I. for the first time the custom is met with of summoning to Parliament the son of a duke, a marquis, or an earl, out of courtesy, even in his father's lifetime, under the title of a second barony, which the father holds either really or nominally; and this custom has been observed down to the present day. The summoning of the son in addition to the father was only regarded as a personal *ad interim* measure; such a peerage is merged in the principal peerage, when the succession arises, and thus creates no hereditary dignity.

The still continuing dispute as to whether the English peerage was not originally a barony by tenure, arose from social ideas. All classes of society wish, not to acquire their political rights, but to enjoy them by virtue of tenure, and by inherent right. Hence the social conception always kept recurring to the favourite idea of an estate of the realm based merely upon possession; whilst the English peerage is not built upon the bare possession of privileged estates, but upon personal summons to the council of the realm, summons which only became by custom hereditary in a direct ratio to the customary performances entailed upon the tenants of great estates. The favourite social ideas which are in constant conflict with this fact, even in the Middle Ages, gave rise to a work entitled, "*Modus tenendi Parliamentum*," which according to one manuscript is intended to be an exposition of "How William the Conqueror adopted the mode of summoning Parliament from Edward the Confessor." The tenant of thirteen and one-third knights' fees is, according to this document, able to claim a right of summons to Parliament as a baron; that is, a recognition as belonging to an estate of the realm; and the tenant



of twenty knights' fees as an earl,—an opinion which is apparently based upon a mere calculation of the amount of the *relevia*. Sir Edward Coke seriously regarded this manuscript as a genuine legal authority, and modern investigations endeavour to prove a higher antiquity for it by placing it as far back as Edward I. In that case it would only prove that even in those days feudalism was a favourite hobby. Its positive statements were almost in accordance with the condition of the Parliament in the fourteenth century, which the author endeavours as far as possible to refer to custom of time out of mind (Select Char-

ters, 502). But it is not necessary when examining the many curious descriptions of the "*Modus*," which are at variance with documentary legal history, to think exactly of a feudal Pseudo-Isidor; they are rather similar transformations to those which occur even in our own day in the drawing up of all genealogical trees, and are the conceptions of a herald's office and not of politics and public law. Good remarks on this point are made by Pauli ("*Bilder aus der Englischen Vorzeit*," 1858, p. 65, *seq.*), together with vivid sketches of the procedure in Parliament.

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## CHAPTER XXV.

### *The Share of the Commons in the Parliament—Origin of the Lower House.*

In addition to the deliberative, judicial, and taxing assemblies of the prelates and barons, Edward I. repeatedly summoned deputies of the *communitates*, without formally binding himself to the irregular procedure of 49 Henry III. The warlike King, in want of money, found in the wars which he undertook to increase his island-realm, the most valid reason for summoning his faithful *communitates* to "meet common dangers with common resources," and to take counsel with the King as to the means of carrying on war, and raising funds. This proceeding is first clearly shown in 10 Edward I. (24th November, 1282), when, after the conquest of Wales, four knights from each shire, and two deputies from different towns were summoned "to hear and to do such things as should be laid before them on the part of the King." Once again, in 11 Edward I. (on the 30th September, 1288) there were summoned to the parliament at Shrewsbury (in addition to one hundred and ten earls and barons), two knights from each shire, and two burgesses from each of twenty-one towns, to deliberate on the affairs of conquered Wales. In 18 Edward I. (1290), the sheriffs were directed to send two or three knights from each shire "*ad consulendum et consentiendum his quæ*

*comites barones et procures tum duxerint concordanda*," but no deputies of the towns. The object was the framing of important statutes, particularly the statute *Quia Emptores* as to the alienability of the fiefs. In 23 Edward I. (30th September, 1295), in the stress of war, two knights from each shire, and two burgesses from each town were commissioned "*ad faciendum, quod tunc de communi consilio ordinabitur*;" upon which a considerable grant of aids was made. After this great parliament at Westminster, at which two hundred deputies from the towns appeared, the summons of counties and boroughs was repeated under the same reign several times in the following years.\*

\* This epoch of Edward has been treated of in detail in the Peers' Report (i. 171-254). As early as 1 Edward I. we find four knights from each shire, and four deputies of the towns summoned, but only as deputations for taking the oath of allegiance. In 3 Edward I. the statute of Westminster I mentions the earls, barons, and the "*communitas*," but only in the sense of the aggregate Crown vassallage. The grants of subsidies are made by the prelates and barons alone in the name of the "*alii de regno*." In 11 Edward I. we find the first formal deputation of four knights of the shire, and two men of the towns, who shall appear "endowed with full powers from their *communitas*," to hear and to do as shall be referred to them on the part of the King; thirty-two counties shall send their men to Northampton, five shall send their deputies to York. This is a primitive, as yet irregular formation (Peers' Report, i. 187, 188). To the later parliament at Shrewsbury (11 Edw. III.), for the deliberations respecting the incorporation of Wales, two knights were summoned from each county, and deputies for London and twenty other cities. The statute of Acton Burnell *de mercatoribus* was, however, passed by the "King and his counsel;" the collaboration of the commoners is not discernible in it (Report, i. 189-191). In 12 Edward III. the statutes of Wales and Rutland appear to have been issued under the sole authority of the King (Report, i. 191, 192). In 13 Edward I. the statute *de donis conditionalibus*, the statute of Westminster 2, and the confirmation of Magna Charta were again proclaimed without the assistance of the *commune*, "*habito super hoc cum suo concilio tractatu*" (Report, i. 194). In 16 Edward I. the Chancellor of the

Exchequer (after the barons have refused a subsidy) imposes a *tallagium* upon the towns and demesnes. In 18 Edward I. the sheriffs were ordered to send two or three knights *de discretioribus* with full powers for themselves and the *communitas comitatus* "*ad consulendum et consentiendum his quæ comites et barones et procures tum duxerint concordanda*;" five counties send three knights, all the rest two knights; towns are not summoned. The object was probably to gain the consent of the vassals of the Crown to the statute *Quia Emptores* as to the alienability of the fiefs (Report, i. 197-204). In 22 Edward I. two knights *de discretioribus* were summoned with full powers "*ad consulendum et consentiendum*;" by a second writ the sheriffs were subsequently ordered to send two additional knights (Report, i. 211). In 23 Edward I., in the time of war and pecuniary embarrassment, the first regular summons takes place (the original writs of which still exist), of two *milites* from each county, and two burgesses from each one of one hundred and fifteen cities and boroughs "*ad faciendum quod tunc de communi consilio ordinabitur*." The object is the obtaining of an important subsidy (Report, i. 217, 218). In 24 Edward I. a new grant of subsidy for the counties and towns is made. In 25 Edward I. the statute *de tallagio* was passed, which will be discussed below. In 27 Edward I. the statutes *de finibus levatis* and *de falsa moneta* were again proclaimed without the assistance of the *commune*. In 28 Edward I. occurs the summons of three deputies from the shires to a *concilium* without the summons of the cities; in 34 Edward I. a general grant of subsidies in a *concilium* otherwise irregularly convoked.

No constitutional record had as yet acknowledged the necessity for such a summons; but what once took place under Henry III., in a time of tumult and on compulsion, was repeated by a wise monarch in recognition of a political necessity. He wished to ask and hear the commons, and have their consent to certain things, so that they might contribute money with the more readiness. Accordingly two kinds of convocations occur—

1. *A general summons* for the purpose of strengthening the laws, and redressing national grievances, such as had been already attempted at the time of the barons' war, but had not been established.

2. *A special summons* for a grant of tax, or deliberation of certain political acts, which had several times taken place in the former reign.

The summonses were for a long while very discretionary, and the number of the towns varied greatly. The writs of summons are directed to the sheriffs, sometimes immediately to the town magistrates; the deputies receive special instructions, and on account of money transactions there appear as a rule two from each *communitas*, in order to exercise mutual control over each other. The King was accustomed to receive their petitions at the commencement of the proceedings; and at the close to dismiss them with his thanks, and with the request that they would be prepared for any new call. It was not until the last year of Edward I.'s reign that they were mentioned in the preamble to a statute. But from that time forth their importance, like that of the hereditary peerage, slowly advances, corresponding to the increasing importance of the local unions for State-service and State-taxation. Because these State rights are connected with corresponding State duties, the Lower House attains a share in the Government, not (like the peerage) by participating in the royal judicial power, but in another direction, viz.: Firstly, in the granting of taxes; secondly, in the central government, by means of petitions and motions; and thirdly, in legislation.

- I. *The taxation of the counties and towns* was at first the unmistakable object of the Lower Houses being convened. Under Edward I. it was no longer doubtful what was meant by "*faciendum*."

For two generations it had been an established fact that the ordinary revenue of the King was insufficient to cover the needs of the country, and that it required to be periodically supplemented by taxes (extraordinary revenue). For more than two generations it had been an established fact that these subsidies neither could nor ought to be provided by the

*auxilia* and *scutagia* of the Crown vassals alone, but that, in due proportion, the *auxilia* (*tallagia*) of the towns, freeholders, and farmers of the demesnes should also contribute a hide-tax (*carucagium*—the *carucata* equals a hundred acres), and that personal property should be liable to the extent of a fraction of the total income (one-tenth, one-fifteenth, etc.).

Since Henry III. began to reign it had been established by numerous grants and refusals, that such universal impositions of taxes should be negotiated in a *concilium* of the Crown vassals.

The time had now arrived in which these various groups of taxes necessarily developed into a general land-tax and income-tax, upon the following principles:—

1. The way was prepared for the blending of all the individual taxes that were raised from landed property, into a general land-tax, by the exaction of a contribution from hides on the occasion of the Saladin tithes, on the ransom of Richard I., and in the *carucagium* of 1194; and then again several times under Henry III. (for example, in 1220). But it was no easy task to make this method of taxation acceptable to the Crown vassals.

The *scutagia* were only intended to serve as the substitution money of a knight's service for campaigns which were really intended; but experience had long since taught that the royal council, in case of need, could feign a campaign *ad hoc*.

The *auxilia* of the feudal vassals were only due in certain cases where the honour and the necessity of the feudal lord were involved; but it was still possible to appeal successfully to the patriotism of the highest council of the Crown, showing that a case of need in the person of the sovereign ought not to be waited for, but that a clear need of the national government was just as important as the cases of honour and necessity in his person; regard, however, being had to the fact that the vassals had already been severely burdened in their heavy *relevia* and other feudal dues.

The military fiefs were, according to the feudal register, assessed at like amounts for the aids as for the scutages; whilst the *carucagia* of the common possessions were at first taxed according to the hides, but afterwards according to the actual produce, by the assessment commissions of the county. It was now certainly in harmony with the usage of the landed interest to leave the rate of the land-tax, when once fixed, as far as possible unchanged, and in the same manner it was incompatible with the honour of the great vassals to allow themselves to be assessed by committees of the townships. But on the whole, the rating according to the actual yield of the hides was more favourable for the knights' fees, and

the new assessment became still more acceptable when, having regard to their other feudal dues, the knights' estates were assessed at a somewhat lower rate, and their honour was guarded by the fact that special commissions were appointed with the co-operation of the Crown vassals for the assessment of this tenure.

It will be shown below that the above views led to the formation of the general land-tax, raised according to a uniform rate from the whole county.

2. A supplementary tax raised from personal property had originated long before in the royal claim to the *tallagia* of the farmers of demesnes and towns. It was manifestly in the interest of the taxpayers that the amounts should be uniformly fixed by proceedings in Parliament. Quittances of fee-farm and purchased guarantees were in themselves checks upon the unbounded arbitrariness of the Exchequer. In another direction the civic revenue had increased to such an extent, by trade and industry, that it had become a considerable source of taxation side by side with landed estates. Undeveloped as were the economic notions of the Middle Ages, it was perceived even in those days that in addition to indirect taxation, a direct taxation—that is, a taxing of the total income of individuals—was reasonably justified. On the raising of the Saladin tithes, and at the ransom of Richard I., this kind of assessment had come into use; John had extended it in his arbitrary manner to the whole population; under Henry III. it had been repeatedly applied, though with the exception of the clergy, and probably with a special rating for the Crown vassals. Making such allowances principally in the case of an assessment at a lower rate, regard being had to the other burdens imposed upon the *tenentes in capite*, the income-tax was suited to be raised as a usual accompaniment and supplement of a general land-tax, which it had actually become.

3. The extension of the land and income-tax to the clergy had been so far accomplished in the preceding period that the prelates, after some opposition, peaceably paid the aids and scutages imposed upon their great landed possessions, so far as they were held by barony, and in such cases made their grants in common with the temporal vassals of the Crown. On the other hand, they resisted the taxing of their other revenue arising from land held by ordinary tenure, tithes, offerings, and surplice fees, etc., although these had contributed to the Saladin tithes, and apparently also to the ransom of Richard I. But meanwhile the papal rule had accustomed the English clergy to a heavy taxation of their whole income, and had assessed the rich English ecclesiastics

on a most profitable scale. The taxation of the smaller livings, which under other circumstances would have been difficult to justify, could in England be justified by the disproportionate amount of their income. And now that a general income-tax for the lay population had become the rule, a time came in which, influenced by a higher patriotic feeling, the English clergy, if they were to pay income-tax, would rather pay it to the King than to the Roman bishop. As a matter of fact it was soon seen that they made no serious resistance, on being forced to make payment to the King, so long as the point of honour remained intact, so that the clergy granted their income-tax through special commissioners, under special arrangements, and, as far as possible, according to a fixed rate.

4. The exaction of the tolls and duties on consumable goods was certainly in some measure limited by the usage of the former period, but was subject to the police control of the King, and to his right as the arbiter of commerce to regulate the ports and markets, which right frequently led to attachments of property and to special transactions with foreign and native merchants; whilst (as people by degrees became convinced) the payments wrung from the dealers fell finally as imposts upon the consumers. It became more and more manifest that the exaction of indirect imposts could not well be separated from the grant of direct taxes.

Such was the state of the taxation of the country, which under Edward I. led to a stormy crisis, not unlike the course of events accompanying the origin of Magna Charta; yet with this material difference, that on this occasion of general resistance offered to a great monarch by his country, each side acted loyally and with confidence in the loyalty of the other. Edward, suffering under the evil effects of the barons' war and the bad economy of his father, began his reign with financial embarrassments, which, owing to his numerous wars, became much aggravated. The brilliant successes of his rule, however, placed him in the position of being able to appeal successfully to the patriotic feelings of his prelates, barons, and *communes*, who, as a rule, willingly responded to the greatest calls made upon them. In the year 1294, however, being compelled to extreme exertions by the military events upon the Continent and his obligations towards his allies, he resorted to violent measures, demanding not less than the half of the clerical revenues, after he had already attached the treasure of the Church and the wool of the merchants; yet after long negotiations he contented himself in the following year with one-tenth from the clergy, one-eleventh from the barons and knights, and one-seventh from

the towns. In the ensuing year, whilst the needs of war became intensified, Pope Boniface VIII., in the bull "*Clericis laicos*" of 24th February, 1296, intervened with an absolute prohibition to the clergy to pay any tax whatever out of the revenues of the Church; whereupon Edward answered by confiscating the estates appertaining to the archbishop's see, and declaring the whole of the clergy "outside the pale of his protection" (that is, in outlawry). In this critical situation the great constable and the marshal, in harmony with the feelings of the Crown vassals, refused to do their services for the expedition to Gascony, withdrew after a violent altercation, and prepared for armed resistance. Edward, thus hard pressed, again resorted to a distraint upon all the wool of the merchants, to the imposition of heavy payments in kind upon the counties, and then to a levy of all those capable of bearing arms, including both feudal vassals, and all tenants of £20 value. Thus at length the whole of the people, with the city of London at their head, were driven to resistance, with the clergy in outlawry, and the barons in arms; and again did the two great officers of the feudal army refuse to do their feudal duty, and left the army. Yet the King succeeded, by irregular negotiations, in obtaining one-eighth from the barons and knights, one-fifth from the towns, and a proportionate amount from the clergy, with whom conciliatory negotiations were carried on. In this state of affairs, on the 22nd August, 1297, the King was obliged to join his army on the Continent, leaving behind him his son and a council of regency, which latter forthwith found itself compelled to enter into negotiations with the discontented earls and a strong armed force. Their demand aimed at the renewal and completion of Magna Charta by a clause concerning the general right of the estates to consent to all grants of taxes. The Prince Regent, with the concurrence of his council, accepted the proposal, and signed it on the 12th October, 1295. In consideration of the internal and external position of the country, Edward I. ratified these proceedings on the 5th November, 1295, in a charter dated from Ghent (*Foedera*, i. 880), with the magnanimous resolution to keep his royal word, to which, as a fact, he did remain true. This *Confirmatio Chartarum*, in a French and in a Latin text, contains a fundamental law which may be compared with that of Magna Charta, to the undying glory of the monarchy, in contrast to the events of 1215. The French text (*Statutes of the Realm*, i. 124, 125), which was incorporated into the collection of statutes, is the authentic text; the less perfect Latin text, however, as *statutum de tallagio non concedendo*, has been repeatedly acknowledged, in the

judgments of the courts, to be a fundamental law of the realm. (2)

The right of the estates of the realm, at this time consisting of the prelates, barons, and *communitates* together, to grant taxes, had now become so unconditionally acknowledged that an increase of the tolls and indirect taxes, without the express consent of Parliament, was unequivocally excluded by the framing of the Act in its authentic French text—

*“ Et ausi avoms grante as évesques et as contes et barons et a tote la communaulte de la terre, que mes pur nul busoigne tien manere des aides, mises, ne prises, de notre roiaume ne prendrons, fors que par commun assent de tut le roiaume, sauf les auciennes aides et prises dues et custumees.”*

The right to grant taxes, which had been continuously contended for since Magna Charta (1215), had at length, after the course of a century, been won, and won, moreover, upon the broad basis of the right of those classes who actually paid the State taxes.

The individual tax-paying groups still for a long while made their grants separately. But from the time of Edward II. the tendency to make the direct taxes correspond in respect of both time and amount became evident. The common interest required a uniform scale. If this was to be attained it was necessary to meet together for deliberation; the King for his demesnes, the barons for their baronies and mediate towns, the clergy for their estates, the knights for themselves and their tenants, the towns for their *communitas*. With a judicious perception of their common interest they now gradually join together; at first the knights and the towns, next the commons and the lords, then all the component elements of Parliament; so that the granting of taxes passes into a form similar to that of the legislation. In 2 Richard II. this relation had become so far consolidated that a *Magnum Con-*

(2) The events leading to the origin of the statute 25 Edward I. stat. 1, c. 5, 6 (1297), are referred to in detail, with the addition of the French and Latin text in Stubbs (Select Charters, pp. 487, 498); the French text with an English translation is in the Statutes of the Realm (pp. 124, 125). The Latin text with the heading, “*Articuli inserti in Magna Charta*” is given by Walter de Hemingburgh (ii. 153, 154), with considerable omissions in comparison with the French text. The Latin text is apparently the incomplete draft laid before the regent for his ratification, and not confirmed by any official document, but which was recognized in the preamble of the

Petition of Right under Charles I. in the following form as a statute recognized by legal decisions:—

*“ Nullum tallagium vel auxilium per nos vel heredes nostros de cetero in regno nostro imponatur seu levetur sine voluntate et assensu communi archiepiscoporum, episcoporum et aliorum prelatorum, comitum, baronum, militum, burgensium et aliorum liberorum hominum in regno nostro.”*

On the demand of the barons this transaction was, with repeated confirmations (1299, 1300, 1301), united with Magna Charta, of which that of the year 1301 is counted as the thirty-second confirmation.



*cilium* of the prelates and barons declares itself incompetent to grant taxes without commoners. In straits for money the later kings certainly endeavour from time to time to evade this acknowledged principle, by having recourse to an older special title, sometimes in their character of owners of demesnes, sometimes as feudal suzerains, and sometimes as wardens of ports. But as lords, knights, and towns hold together in defence of their common interests, the attempts all fail, and at the close of the period the guarantee is repeated by Richard III.

To understand the spirit of these grants of taxes the word of Edward I. is of importance which declared that the taxes proposed to be granted were "*for the common profit of the realm*:" that is, he had renounced a portion of his personal rule in exchange for a national taxation, which caused a number of objections to fall to the ground; but in the stead of these there arose the claim of the estates to inquire into the purpose and the means. The principle that all measures for imposing taxes with regard to the extraordinary revenue of the King are in the nature of a compact, has never been given up. The money bills have never been brought into the normal form of the statutes; they never received any formal assent of the King, to whom they were moreover addressed in a formal document, which was subsequently entered upon the Parliamentary records. The last instance of a grant in separate resolutions was in 18 Edward III. In the later protocols both houses were mentioned together, frequently with the remark that a common deliberation had preceded. The old names for the various taxes, *auxilia*, *scutagia*, *hydagia*, *tallagia*, were for some time mentioned side by side; the interests of the tax-paying estates came into manifold collisions; and numerous experiments in taxation were tried.\*\* The landed interest especially from time to time endeavoured to alleviate its heavy burdens of taxation by payments in kind, by poll taxes, taxation according to parishes, and by a progressive income-tax. All these variations, however, are but ephemeral attempts when compared with the established system of English taxation, which blends together at last (1) all land-rates into a general land-tax; (2) all personal rates into a uniform income-tax; and (3) all tolls and indirect taxes into a general tariff; so that the last-named become an appropriate permanent revenue of the Crown, which in later times is guaranteed to the King as a grant for life.

\*\* The long series of these variable experiments in taxation, down to the close of the Middle Ages, will be found

enumerated in the *excursus* at the end of this chapter.

The right of the estates to grant taxes, thus attained, is, indeed, a normal legal creation. The separate rights of the various classes of society amalgamate and become merged in a common and joint consent. Whilst the tax-paying groups in Germany, separated as they are into *curia*, only hold together in case of necessity, but then fall asunder, the peculiarity of England lies in the serious and permanent amalgamation of the estates. As lords, knights, and towns acknowledge an essentially similar liability to pay taxes, seeing that they have under a uniform pressure learned the necessity of holding together, there remains to them also the consciousness of their common interest. The great landed proprietors enjoy no exemption from taxation, no judicial authority, no right to represent the taxation of their tenants; therefore it is that England presents to us a phenomenon which was impossible in Germany in the Middle Ages, namely, that of a union of the estates of the realm and the provinces (lords, prelates of the realm, knights, and towns), into a single parliamentary body.

II. The participation of the commoners in the current business of the realm developed itself in the form of *petitions*, *common grievances*, *motions*, and *impeachments*.

The discussion of the grievances belonged hitherto, by virtue of their judicial and administrative nature, to the royal council and the great council. They were received by the *receivers*, reported by the *triers* and *auditors*, and referred to the competent department. The mode in which the petitions were sorted, distinguishing those to the "Chancellor," to the "Exchequer," and to the "Justices," corresponds to the division of the departments of State. At least nine-tenths of the petitions have reference to the administration of law. The commoners for a long time still acknowledged, both in form and fact, that they represented the interests of the tax-paying classes and the country, whilst the office of guarding the legal and administrative organization of the country belonged in the first place to the prelates and magnates. (2\*)

(2\*) The basis of a long chain of petitions is formed by *Magna Charta* and its executive statutes, which like a written constitutional document, become the basis of definite demands upon the administration of the realm. The monarchy acknowledges the obligation of carrying out *Magna Charta*, which had been so frequently repeated, and that not in the way of royal favour, but *ex debito justitiæ*. Of course doubts as to the interpretation of those clauses, with which the council defended with great consistency the necessary rights

of the State against extravagant claims, continually arose. The number of petitions gradually increased in a considerable degree. In 1 Richard II., for instance, sixty-nine petitions were presented by the *communitates*, fourteen by the clergy, nine by the city of London, etc. A petition granted formed a precedent, strengthening each subsequent one. In the most important cases redress is made by a new statute, which by its exact phraseology was intended to render the recurrence of the same abuse impossible. A good

The first appearance of the commoners is accordingly, as recorded in the official language of the time, very modest; "*vos humbles, pauvres communes prient et supplient pour Dieu et en œuvre de charité,*" is a usual formula. The King in council is the active government, as regards the petitions; to him belongs the judicial power, the granting of new legal remedies, the decision of the cases, or their reference to this court or that. In its dealings with the royal government, even the assembly of the prelates and barons in this department appears only as an extended council. The final publication of the resolutions was the province of the council; the memoranda of the proceedings were, like other records of the central government, kept by the clerks of the Chancellor.

But the whole of the Middle Ages is a practical refutation of the theory of an executive power *in abstracto*. The motions of the commoners and the petitions which they recommended, gain with each ensuing generation a stronger stress, which metamorphosed their right of praying into a virtual right of co-resolution. In the background of this increasing power there lay the importance of the county and borough property and the power of taxing it, the granting of taxes, the perpetual combination of "complaints and contributions,"—a situation in which it did not very often fail "that a bill was passed in such suitable company." (2<sup>b</sup>)

instance occurred in 20 Edward III., when the complaint touching the commissions of array issuing from the Chancery, and that the King employed the county militia in foreign wars without the consent of Parliament, was followed by the stat. 25 Edward III. stat. 5. c. 8.

(2<sup>b</sup>) The actual compelling power, which gives effect to the motions, is the right to grant taxes. So soon as the Commons feel their co-ordination in the granting of the taxes, they follow the example of the barons in attaching conditions to the subsidies. As early as 2 Edward II., a twenty-fifth was granted under the condition that the King should redress eight grievances which were laid before him, which he promised to do. In 18 Edward III. we find similar conditions made, which were frequently repeated in the course of this long reign. In 23 Edward III. three-fifteenths were granted under the condition that for the future no *tallagium*, or compulsory loan, or any other impost should be levied by the King's council without the grant and consent of the Commons in Parliament assembled, and that this should be

guaranteed by statute. Still bolder towards a regency, in 2 Richard II., they grant supplies under the condition that the King be pleased to declare in what way the great sums which had been granted for the war had been expended. The answer ran, that there had never as yet been any account rendered of subsidies, but that the demand should be acceded to, without establishing any precedent for the future (Parry, 140). Shortly afterwards, the Lower House received notice that the officers of the Exchequer were ready to present their accounts. At the request of the Commons nine commissioners were appointed to examine into the condition of the revenue, and the disposal of the personal property of the deceased King. In 3 Richard II. they grant a subsidy with the request to the King, that he may be pleased not to convene another Parliament to tax his poor Commons until one year after date ("Parl. History," i. 357). With regard to the presentation of accounts, Henry IV. had, in 1406, again returned the proud answer: "Kings do not present accounts." But in the very next year

The Commons first of all demand to be informed of the petitions that flowed in from the most various sources. As early as 3 Edward II. we meet with "receivers of petitions" also in the Commons. After the manner of the *Magnum Concilium*, in 12 Edward III., there was also conceded them a share in the appointment of the reporters, although they have no right of decision and no participation in the resolutions of the great council. Their altered position became also gradually apparent in the phraseology of the time. The "*humbles pauvres communes*" are called under Richard II. "the right wise, right honourable, worthy and discreet Commons." The petitioners outside the House now also address their requests to the right honourable House of Commons itself. The custom of presenting private petitions immediately to the Lower House, with the desire that the House be pleased to exert its influence with the King, occurs for the first time under Henry IV. Such petitions are now directed sometimes to the King, sometimes to the King in council, sometimes to the King, Lords, and Commons, sometimes to the Lords and Commons, and sometimes to the Commons alone, with the request to use their good offices with the King and the council. The answer to the complaints was generally made known at the close of the proceedings, that is, after the votes of money supplies. The attempts to reverse this were at first frustrated, but finally allowed to prevail in cases of pecuniary distress. The right of being informed as to the employment of the moneys previously voted appeared at an early period almost inseparable from votes of money. A claim of this description is met with for the first time at the commencement of Richard II.'s reign; it was at once granted, saving all precedents for the future, and was repeated in critical times, without, however, leading to a system of periodical presentation of accounts. (2°)

a presentation of accounts is made to the Lower House, and the victory thus won was never again formally called in question.

(2°) The order in which subsidies and grievances were to be taken became early a contested point. The council, in proportion to the urgency of the grievances and pecuniary needs, from time to time accedes to the demand made upon it to answer the complaints before taking the vote of supplies. But acts of grace on the part of the Crown are never to be made dependent upon such conditions (5 Richard II.; Parry, 145). Amidst the manifold pressures of Henry the Fourth's reign, and in the further

course of the house of Lancaster, the right of the Commons to make conditions for the employment of the subsidies, to demand the presentation of accounts in cases of a particular kind and to summon the officials charged with such presentation, to recommend retrenchment in certain branches of the public expenditure, and to make the granting of fresh subsidies dependent upon the redress of certain national grievances, was established by many precedents (Hallam, iii. 84). The dispute as to the antecedent redress of the grievance was in practice settled thus, that the grant of money was as far as possible put off until the last day of the session. The custom of giving

After the growing influence of the Commons had begun to make itself felt, their advice was frequently asked in the general affairs of the country on the initiative of the Government itself. This course often meets with resistance on the part of the Commons, who foresee a grant of money as the consequence of their advice. In 28 Edward III. they declare, with reference to a treaty of peace laid before them, that "what was pleasing to the King and the *Grants*, would be also agreeable to them." In 43 Edward III., however, they resolve, together with the Lords, that the King may with right and good conscience again adopt the title of King of France; at the same time the renewal of the war was voted, and a subsidy granted. It was consequently declared, after such reference, "that the war had been undertaken with the general consent of all Lords and Commons of the kingdom in various parliaments," from which the central government did not fail to draw far-reaching deductions. In 7 Richard II. the Commons refuse to declare either for war or peace, but assert after much urging that they were more for peace (Parl. Hist. i. 380). The immediate interference of the Commons with the appointment of the royal ministers, on the other hand, and an immediate direction of the proceedings of the government in the council, is only met with as an expression of revolutionary feelings, and always under the guidance of the parties in the House of Lords. In 5 Edward II. they make common cause with the Lords to secure the somewhat violent appointment of the "ordainers" as a regency-council; just as in later times they did when a reaction had taken place to obtain their dismissal. In 15 Edward III. an extravagant petition was presented, the aim of which was the appointment of the justices and ministers in Parliament, and which was in the main acceded to, though under protest of the royal council. Meanwhile by proclamation to the sheriffs, the King, after the close of Parliament, declared the statute that had thus been passed to have been wrung from him against his will, and accordingly null and void, and two years later Parliament agreed to its formal repeal. At the close of the reign of Edward III. and on Richard the Second's accession, the Commons were incited by the personal incapacity of the King to govern, and by those members of the royal family who were nearest the throne, to actions

a general name to the grants made for definite purposes dates from the reign of Richard II. and Henry IV. The larger grants were as a rule described "for the defence of the realm"; tonnage and poundage, "for the protection

of the coast;" the remains of the old Crown lands were reserved for the expenditure of the household; a portion of the poundage and of the subsidy upon wool for the defence of Calais (Stubbs, iii. 264).

which exceeded their competence. Under Henry IV. it is the usurpation of the throne which, combined with the speedy unpopularity of the King, produced encroachments; in 5 Henry IV. motions for the removal of certain persons from court; in 7 Henry IV. motions approving the appointment of certain persons of the royal council, and in consideration thereof granting subsidies; in 8 Henry IV. thirty-one articles which positively force the council upon the King. But all such encroachments were neutralized under the same reign. Somewhat different was the co-operation of the Commons in the functions of regency during the minority or lunacy of a king, which, owing to the want of an established regency-statute, devolved principally upon the *Magnum Concilium*, together with a certain co-operation of the Commons, dependent upon power, influence, and party feeling, as well as upon the temporary state of affairs at court. For instance, in 50 Edward III. the Commons recommend that the royal council be increased in order to be permanently near the person of the King, who was in his dotage; which was with certain provisoes agreed to. On the accession of the minor, Richard II., the Speaker moved that eight persons be appointed permanent counsellors of the King; then, later, that the Chancellor, the Treasurer, the great officers and counsellors be appointed by the Parliament. We may also regard as special cases the proceedings on the accession of Henry VI., and on the later regency of the Duke of York. Apart from cases of a personal incapacity to govern, an immediate influence of the Commons upon the members and the procedure of the supreme government always worked badly, and was discarded after a short time.

On the other hand the application of the right of motion to the impeachment of executive officers of the royal council was significant. The Norman administrative law had made the prosecution of crimes, as being a part of the maintenance of the peace, a common duty, and thus formed a communal right of indictment. As the *communitas* of the county brings its official presentments as public indictments, as after Edward III. the grand inquest became even the regular instrument of indictment, so the *communitates* united in Parliament could not with consistency be denied the right of accusation. As *communitas regni* they begin to make use of this right for the first time in 51 Edward III. (1376), in the manner of a presentment by the county jury. Under Richard II. the accusations became numerous. The power of such an accuser and the high position of such an accused person naturally rendered these cases the subjects of the highest reserved jurisdiction; accordingly they are addressed to the King in the

great council, and thus begins the system of impeachments by the Lower House before the Upper House. (2<sup>d</sup>) Proceeding as it did from high quarters, the right of impeachment was, like the right of petitioning, certainly dependent upon the actual balance of power, and was accordingly fluctuating.

But the advance showed itself most persistent in the transition of the right of petition into a participation in the legislation.

III. *The participation of the commoners in legislation* proceeded from the development of their right of petition. In the cases in which a national grievance could not be redressed by the existing law, and in which accordingly a new ordinance was needed for such redress, the ordinance as a constitutional measure proceeded from the King in council, in more important cases (after Edward I.) with the consent of the prelates and barons in the great council. A consent of the commoners was not yet spoken of; but the petition itself involved the consent of the Commons, and therewith also their previous sanction to the statute that was to be passed. The growing authority of the Commons gradually gives such a value to this virtual consent, that their actual consent begins to be formally mentioned, as was done on one occasion in the last

(2<sup>d</sup>) The right of impeachment begins in 51 Edward III., in a time of great administrative abuses under a King in his dotage. The great political trials begin as early as Richard II. In 7 Richard II. the Commons petition against the Bishop of Norwich and others, who are made defendants. In 10 Richard II. they determine on the impeachment of the Lord Chancellor, the Earl of Suffolk, who was arrested and afterwards condemned. Shortly afterwards the accusation of the judges takes place, which ends with the sentence of death which has been already mentioned. In 21 Richard II. after a re-action has ensued, they impeach the Archbishop of Canterbury, who was condemned to banishment for high treason. Other lords were put on their trial by the Lords Appellant and were condemned. At first there alternately appeared also an appeal (private accusation), with proof by duel or witnesses, but this was expressly abolished by Henry IV. The accusation by the Lower House in a body, after the fashion of a presentment of the county jury, is apparently the rule. The ensuing reigns of Henry IV. and V., however, give Parliament no cause to put ministers on their trial; Henry IV.

rather gave way with comparative ease to the urgent complaints, by frequently changing his ministers. But under Henry VI. the accusations are renewed, beginning in Suffolk's case in the form recognized by the legislature, i.e. by a "bill of attainder," which overrides the customary forms of the judicial procedure. A participation of the Commons in the judicial business of the council and the great council was not as yet gained. In the tumultuous proceedings accompanying the deposition of Richard II., the Commons, as members of the selected commission, co-operated and assented. In 1 Henry IV. they expressly move that they do not wish to be regarded as parties to the sentence which condemned Richard to life-long imprisonment, "as such sentences belong exclusively to the King and the lords." The answer ran that the Commons were petitioners and movers, but that the King and the lords had ever had and should have the right of giving judgment in Parliament; with the reservation that in the statutes that were to be passed, or in grants and subsidies, or in grants for the common advantage of the realm, the King wished to have their advice and consent.

year of the reign of Edward I., and several times under Edward II. These proceedings are repeated, as in the assemblies of notables under Henry II. and III. The mention of the consent, which is at first only made use of as suitable, becomes gradually a claim within a certain range, which is ever becoming wider. The turning point in this situation is the long and financially embarrassed reign of Edward III., in which there was, from year to year, the continual necessity to summon complete Parliaments, in all not less than seventy times. The Commons, who, until then, had been only occasionally mentioned in connection with parliamentary statutes, are from this time seldom omitted—nay, their assistance became more and more frequently mentioned in the preamble to the statutes. The usual style now distinguishes motion and consent; the King issues decrees on motion of the Commons with the sanction of the lords and prelates. The rolls of Parliament prove that in reality the more important statutes emanated from them. From such an initiative to a right of consent there was now only one step. Edward III., embarrassed for money, and anxious to gain a counterpoise to the great barons, saw himself at the close of his reign forced to a concession couched in general terms. An express recognition of the right follows in 5 Richard II.

After 1384 no more special summonses were issued, but only general ones for universal national affairs; and there now begins (as in the Lords) the usual dating back of the pretensions of the estates. In a petition of 2 Henry V. the Commons declare it to be the "liberty of the Commons that no statute be passed without their consent; that they have ever been consenting parties as well as petitioners, and accordingly request that for the future nothing be added to or taken away from their petitions." In answer to this, the King assented that they should for the future in no case be bound without their consent (Rot. Parl. 2, Hen. V.). As after Edward II. the dominant influence of the Lords became discernible in the use of the French language in the statutes, so after 5 Henry IV. instances of the use of the English tongue begin to be apparent as symptoms of the growing influence of the Commons. As early as the Parliament of 1362 the use of the English language had been introduced in official transactions. The Parliament of 1365 opened with a speech in English, and was probably also dismissed by Edward III. in English (Stubbs, iii. 478). From the time of Henry VI. it was the custom to bring in the motions at once in the form of a bill. From Henry VII. the right of the Commons to assent was expressed in precisely the same manner as that of the Lords. The preamble of the parliamentary statutes



as it stands at present has, however, been only framed since the time of Queen Mary. (3\*)

Hand in hand with the acknowledged right of the Commons to assent, there became developed under the long reign of Edward III. the legal conception by which the decrees promulgated with the assent of the estates exercise a force of a stronger and more permanent kind, so that what had been ordained by the King with the consent of the Lords and Commons, could not be altered without the consent of all parties. It is the legal logic of the German law, which here again comes into play. If the *jus terræ* can only be altered by ordinance *consensu meliorum terræ*, the common law, altered with this consent, becomes itself again *jus terræ*, which can only be altered *consensu meliorum terræ*; that is now, only with the consent of the Commons. The binding force of the royal right of ordaining is upheld in principle,

(3\*) The participation of the Commons in legislation became matured in the course of about two generations. There is no doubt that under Edward I. only a deliberative voice of the commons was intended. This was expressed in the form of their summons: "*Ad faciendum quod de communi consilio ordinabitur*" (in 26 Edw. I., 28 Edw. I., 7 Edw. II., and for some time afterwards). In 35 Edward I. the statute of Carlisle contained for the first time the following: "*Dominus Rex post deliberacionem plenariam et tractatum cum Comitibus, Baronibus, proceribus et aliis nobilibus ac communitatibus regni sui, habitum in premissis, de consensu eorum unanimi et concorditer ordinavit et statuit,*" etc. But this assent was probably only mentioned in the sense in which in the earliest Norman period an assent of the bishops and prelates had been spoken of, as a constituent of moral authority for the land. To the constitutional validity the *assensus* was just as little essential as was the unanimity in the resolution which has been mentioned. Numerous events of Edward II.'s reign prove that the council of the prelates and barons was still alone regarded as "the legislative assembly." Since 5 Edward II., indeed, the magnates had thrust the participation of the Commons, except in the province of the grant of subsidies, comparatively into the background. With the reaction, which arose in 15 Edward II., and ended with the execution of the Earl of Lancaster, an ordinance was issued in Parliament, which rejected the exclusive

pretensions of the barons, and looked like a concession of a share in the legislation, but which in this connection did not as yet contain such: "*Revocatio novarum ordinationum anno 1223; les choses, qui serount à establir, soient trestes accordées et establies en parlements par nostre Sr. le Roi et par l'assent des Prelats, Countes et Barouns et la communalité du roialme.*" The point of this declaration was directed against the exclusive pretensions of the magnates; the King is the legislative authority with the consent of the rest, but not the Lords as such, as had been the case for a series of years, against the will of the King (Rep. i. 282, 283). But the declaration is significant in so far as it is the first express recognition of Parliament as a legislative assembly. Although it admitted as yet no rule as to the matters in which the consent of the great legislative assembly was necessary, yet indirectly it lays emphasis upon the fact that where a consent to royal ordinances was to be given, the *Assens* of the Commons who have been convened, must be as essential as the assent of the lords. Under Richard II. appears shortly the "assent of the prelates, lords, and commons." Under Henry IV. and V., in addition to the assent of the prelates and barons, the prayer of the Commons is again spoken of. But under Henry V. we meet again with the "consent" of the Commons. In 11 Henry VI. the expression "by the authority of Parliament" first occurs (Stubbs, iii. 465).

but the application is limited with respect to repealing former *statuta*. Such an obligation of the King to respect the permanent and fundamental laws of the realm, even though in opposition to his momentary wishes, had been already expressed by Edward the Second's coronation oath. With its more consistent enforcement the strongly conservative feature of the parliamentary constitution came into action, which allowed the royal legislative power to remain intact in its former dignity, but rendered changes in the existing law dependent on conditions of consent which had to be complied with, in the absence of which a mere expression of the royal will was not to be regarded as law. This is so much in harmony with the permanent character of the State, that throughout all the vicissitudes of centuries it remained the leading idea. (3<sup>b</sup>)

Upon this basis there now becomes fixed a distinction between the notion of *statute* and *ordinance*, in the phraseology of the laws, of the courts, and of the science of jurisprudence. From the time when Henry II. and III. had issued important royal ordinances with the consent of the assembly of notables,

(3<sup>b</sup>) The difference between statute and ordinance depends now purely upon the consent of the three estates. If the Introduction to the Official Collection of Statutes, vol. i. p. 32, says that the distinction between *Statuta* and Ordinances has never been sufficiently explained in principle, this is owing to the fact that the *statuta vetera* have a repealing force even without the consent of the three estates. The Anglo-Norman monarchy had formally wiped out the difference in the same way as the period of absolutism in Germany. But in the main point the precedents of this period admit of no doubt. In 14 Edward III. a commission of justices, prelates, barons, twelve knights of the shire, and six burgess-deputies was appointed to hold daily sittings, to decide on the points and clauses in the statutes, "*que sont perpetuels*," and such "*que non sont mys perpetuels*." The revocability or irrevocability thus formed the essential mark. In 15 Edward III. *grants et communes* petitioned, that petitions which had been granted in *points a durer* (in permanent matters) should be granted by statute, and others by charter or patent (Rot. Parl., ii. 113, 132). In 28 Edward III. they approve an ordinance that had been issued, and wish it to be raised to a permanent statute, whereupon it was entered as such upon the statute roll. In 37

Edward III. the King inquired of both Houses whether they wished the resolutions that had been framed to be promulgated in the way of an ordinance or of a statute. They replied: In the way of ordinance, "in order that they might be amended at their pleasure." In 51 Edward III. a petition involving a principle is presented—that the statutes which had been made in Parliament should not be annulled, but with the common consent in Parliament. Answer, "That they could not be otherwise repealed." And further, a petition follows on this, to the effect that no statute or ordinance shall be granted on petition of the clergy, but with the consent of the Commons. The reply was, "*Soit ceste matir declaree en especial*" (Parry, 187). In 1 Henry VI. the Clerk of Parliament was ordered to show certain resolutions to the justices of the two courts, that they should take cognizance of such as were statutes of the realm, and should duly transcribe such (upon the statute-roll) for the later cognizance of the Lords, and for publication. The copies of the other Acts concerning the administration of the lords of the council and of the realm, were to be sent to the clerk of the council, recorded in writing, and registered in the chancery in accordance with custom (Nicolas, iii. p. 6).

the more solemn statutory enactments had begun to be distinguished from the simple royal decrees as "assizes." The laws of this time are agreements of the King with all three estates of the realm—prelates, barons, and commons; statutes in the sense of laws by mutual accord in the form of parliamentary enactments. With 1 Edward III. English jurisprudence begins the so-called *statuta nova*, the co-operation of the three estates becoming from this time more regular. These are cited as parliamentary enactments with continuous *capita*. The older ordinances of equal validity issued since Magna Charta (*statuta vetera*) were applied as laws, without inquiring further into the character of the legislating authority.

Connected herewith is the commencement of the framing of the statutes. Under the system of personal government, single decisions, temporary administrative measures, and permanent ordinances were all confused together. Frequently petitions that had been granted lay inoperative for years before the enactments affecting the same were carried out or published. As a rule, at the close of the parliamentary sittings, the council sorted the confused mass of resolutions, and provided for their being duly carried out. It was specially the business of the justices to select such enactments as, being of a permanent nature, should be entered upon the "roll of the statutes" for the cognizance of the courts. But after the right of the estates to participate in the framing of enactments had become established, they further demanded to participate in this selection. In the Parliament of 14 Edward III. a number of prelates, barons, and counsellors were appointed, together with twelve knights and six burgesses, to formulate such petitions and decrees, and to direct the drafting of such as were suitable for permanent statutes (cf. 15 Edward III. c. 7). (3°)

More than once the King himself, after this time, inquired of the Commons whether certain grants should be carried

(3°) The formal framing of the statutes still devolves, by virtue of the constitution, upon the continual council. The actual *statuta* were down to Henry the Sixth's reign only issued by the justices after the close of the sittings, yet with the proviso that no new addition should be made to them, which was on motion of the Commons in 2 Henry V. again expressly guaranteed. But the question of the framing diminished in importance under Henry VI., after the Commons began to introduce their legislative motions in the form of bills (as *petitio formam actus in se con-*

*tinens*). When these had passed *mutatis mutandis* through both Houses, the King found himself in a position to either accept or reject them without further clauses, which gradually became the rule in the course of Henry the Sixth's reign (Hallam, iii. 92). Private petitions also, which were introduced through the medium of the Commons, often passed into the form of statutes, through the consent of the Lords and the King, and formed from this time forth "private bills," which under Henry V. and VI. already fill a portion of the parliamentary rolls.

out by way of "statute" or of "ordinance," to which they replied, that the latter method was preferable, because the requisite alterations could then be more easily made. Hence, in parliamentary phraseology, a distinction arose between two classes of statutory acts :

(i.) *Ordinances* and *proclamations*, that is, decrees which were issued by the King in the old manner on his own authority; as a rule with the advice of the council, and sometimes also with that of the great council.

(ii.) *Statutes*, which having been agreed upon in the new manner with the three estates, were, as being permanent enactments of the realm, entered upon the statute-roll and published.

In the current business certainly the old confusion continues. Single decisions and resolutions touching administrative measures, motions, petitions, proposals for grants of royal favour, creation of peers, etc., were confusedly entered upon the parliamentary roll, often with mention made of the assent of the House, without being on that account enforceable as laws, or being published as such. They were rather rendered executory by means of charters, patents, and administrative decrees, or were not enforced or were modified, so that the special character of the enactment was frequently not perceived until later appeals from it were made. In like manner, also, in their legal effect the co-ordinate position of the ordinances remains intact. Royal charters and ordinances binding upon the magisterial departments exist side by side with the statutes. The civic rights, the municipal summonses to Parliament, and the later charters of incorporation conferred upon towns are further instances of the continued existence of this decreeing power, which, with regard to its derogatory power, is only restricted by the principle that what has been agreed to by statutes passed by the three estates of the realm can no longer be repealed by simple ordinances. The overstepping of these limits was in aggravated cases to be punished by the right of impeachment residing in the parliaments.

IV. This development of the rights of the Commons led of itself tacitly to a division of the whole Parliament into two houses.

This was primarily a consequence of the position towards the Crown and of the long-standing ascendancy that the House of Lords had attained, at a time when the Commons were only associated with it to a very modest extent. Resolutions touching war and peace and international treaties, the direction or command of the armed forces on sea and land, the right of direct or indirect taxation, the judicial and police

power, offices, charters, franchises, and liberties, as well as every magisterial authority, were all centred in the Crown: "*omnis libertas Regia est et ad coronam pertinet*" (Parl. Writs, i. p. 389). To this royal right the parliamentary right of the magnates to participate had been added. The Crown was obliged to rely upon their willing and energetic co-operation in all matters for which the traditional and fixed revenues of the Crown, or its ordaining power under the clauses of Magna Charta, no longer sufficed. The great council became accordingly intimately bound up as a co-factor with the central government in all its powers, acting—

1. As the supreme court of the realm.
2. As a tax-granting assembly.
3. As the highest deliberative assembly in the realm.
4. As a legislative assembly.

In the first division of these functions, elected deputies could not, according to the traditional judicial constitution, take any part.

On the other hand, their right of granting taxes was bound up and intimately corresponded with that of the prelates and barons, and became even predominant in the course of this period.

On that very account their participation in deliberations concerning petitions and statutes became more and more essential, as also in certain cases a co-right of resolution touching the business of the supreme administration of the realm.

The limits which the participation of several hundred elected and changing deputies in the business of State could really attain had to be learnt gradually by experience. In spite of the comparative equality of their legal basis, the two great elements of Parliament were not fitted for voting according to heads and majorities, a proceeding which was certainly not contemplated when the commoners were first convened. Even when a vote was taken on the subsidies, persons who paid taxes in respect of their own demesnes could not be placed upon the same footing with those who recorded their vote as representatives of a county or a municipality. Such a confusion of the tax-paying assembly was manifestly against the interests of both parties. There arose further a division in the formal conduct of business, owing to the fact that the Commons in the first generations were only regularly convened "*ad faciendum quod de communi concilio ordinabitur*." After they had made their appearance, in whatever form they might be received, the lords and prelates retired to the council chamber and left the commons alone together. (4\*)

(4\*) The division of Parliament into two houses primarily arose from the fact that the council of the prelates and barons had, two generations before,

But those remaining behind found themselves, after the close of a generation, already united in the feeling of their corporate unity. In exercise of the right of granting taxes, the representatives of the shires began to regard themselves as the indispensable complement of the baronage, and as the result of that summons of the lesser barons, which was required by Art. 14 of Magna Charta. Hence they refuse to deliberate on taxation in any other manner than in their collective capacity. The municipal plenipotentiaries follow the same example, and also do not enter individually, but only in a body, upon the deliberation of taxation. Again, the urgent and common tax interest brings together the knights of the shire and the burgesses. The *gentz de la commune*, who had been left behind by the great Council, were obliged to regard themselves as a second *corpus*, in which the precedence was conceded to the knights of the shire. The right of granting taxes, which had been formally conceded in 25 Edward I., and which was to reside in the *tota communitas*, as well as in the prelates and barons, in like manner led to the elected representatives regarding themselves as a *communitas*, and desiring to be treated and being treated as such. As early as 8 Edward III. we find a deliberative meeting at which the knights of the shire and the *gentz de la commune* come together and return a common answer. In 13 Edward III. the *gentz qui sount cy a Parlement pour la commune* give a special answer and one at variance with that of the great council. In 25 Edward III. a deliberation of the Commons in the chapter house is spoken of; and from that time the assemblies of both parties are manifestly held in different places. Both bodies transact business separately with each other and with the King. In 57 Edward III. the first Speaker of the Commons is mentioned, who delivers the general declarations of the House. Under Richard II.

attained constitutional rights by precedents, whilst the commoners had now first to acquire such rights for themselves. The writ of summons "*ad faciendum, quod de communi concilio ordinabitur*," expresses definitely enough this position of an extraordinary element with a purely deliberative character. So soon as the King had, at the commencement of Parliament, received the whole of the members either personally or by his commissioner, a division took place, *ipso facto*, in that the *Magnum Concilium* withdrew for deliberation, and the commons remained alone to wait for the issue of the previous resolutions, which were then communicated to them for

the expression of their opinion or their assent. This is the external condition of things which still continues through the century of the three Edwards. In 33 Edward I. the representatives of the *communes* were dismissed at the close of the principal proceedings; the prelates, barons, justices, and others were to remain behind and still form the proper Parliament. In 3 Edward II., for example, enactments in "full Parliament" are spoken of, although no deputies were summoned to it at all. In 4 Edward II. a "full Parliament" is spoken of, after the representatives of the shires and towns had been dismissed (Peers' Report, i. 267).

they exist as a corporate body; and on his deposition are an acknowledged limb of the estates of the realm as then established. (4<sup>b</sup>)

After the usurpation of the house of Lancaster the throne was no longer founded upon the right of birth alone, but upon the recognition of Parliament. Hence there comes a time of mutual recognition of the conditions which had arisen from these events, and hence also that of a clearer exposition of its functions, which finds expression in the Parliament of Gloucester, 9 Henry IV. It was there demanded of the Commons that they should send twelve members to report on the questions propounded and to give an answer. They protested against this on the ground that it was incompatible with their

(4<sup>b</sup>) This institution was brought about by the series of precedents under Edward III. In 6 Edward III. it was laid down that the clergy deliberates for itself, the earls, barons, and other *grants* for themselves. The ordinances which had been proposed (for the maintenance of the peace) were approved by the King, the prelates, earls, barons, and other *grants*, and by the knights *et gentz du commun*. But thereupon the Commons and the clergy are dismissed; the prelates, earls, barons, and *gentz du conseil du Roi* remain behind, as the King requires their advice on important matters (Peers' Report, i. 304). In the following Parliament, 6 Edward III., the prelates deliberate alone; the earls, barons *et autres granz* alone; and the knights of the shire alone. Then the money grant is taken; prelates, earls, barons *et autres granz*, and then the knights of the shire *et tote la soc* (Report, App., iv. 411). In 13 Edward III. it was resolved by all *auxi dier as grants come as petits*, that the King was to be supported by a large grant. The commons (*les gentz qui sont cy à Parlement pur la commune*), however, desire first of all to deliberate with the *communitates* of their counties, as the question was one of a large grant (Report, iv. 501). In 17 Edward III. prelates, lords and commons first meet together in the Chambre de Peynte; on the following day the prelates and the *grantz* assemble for deliberation in the Chambre Blanche. The knights and Commons "attend upon the prelates and lords" and "give their reply by William Trussel" (Parry, 114). In 25 Edward III. the King assembles the *grantz* in the Chambre de Peynte, and the chief justice explains the reason of the summons. On the following

day the Commons also appear, and the chief justice, "on the opening of Parliament," directs his address particularly to the Commons. To shorten the period of their labours, he proposes that they shall choose twenty-four or thirty from among their number to go to the King in the Chambre de Peynte, and that the King be pleased to send some of the *grantz* to them to confer with those who had been thus chosen, whilst the rest should assemble in the Chapter House, Westminster. The Commons refuse this proposal, and, on the contrary, appear *in corpore* before the Prince and the other *grantz* on the following day. From this time opening speeches before the whole assembly occur more frequently; in 36 Edward III. for the first time in the English language (Report, i. 327). In 39 Edward I. the Commons remain behind after the opening in the Chambre de Peynte; the King retires with the prelates and the lords to the Chambre Blanche, and declares to them specially what had been previously uttered in a general address to them and the Commons. The Commons were then again admitted and specially informed on the same subject, and their counsel requested (Parry, 129). In 50 Edward III. the Commons retire to their "accustomed place," the Chapter house (Parry, 134, 135). In 51 Edward III. the first Speaker of the Commons is mentioned, "*Sir Thomas Hungerford, avoit le paroles pour les Communes d'Engleterre.*" The Speaker makes general declarations in their name. Yet his title is still varied; in 1 Richard II. "*Qui a la parole de par la Communité*"; in 1 Henry IV. "*Parlour et Procouratour*"; in 9 Henry VI. "*Parlour commune.*"

liberties, and accordingly the famous Declaration of Gloucester was issued (Rot. Parl., 9 Henry IV. p. 610).

This declaration takes for granted the old position of Parliament as a royal council. It follows that the King may be present in the great council of his prelates and barons; and this is tacitly reserved, except in the case of money grants, which, proceeding as they do from the free will of Parliament, may not be hampered by the personal presence of the King; and in this respect the Commons have now acquired a precedence so that the Lords accede to the grant of the Commons and not *vice versâ*. This constitution of the two Houses of Parliament, at length completed, is henceforward also conspicuous in the style of the proceedings, as in 28 Henry VI., when the Chancellor prorogued the sitting "in the presence of the three estates of the realm." (4°)

The Commons from the first claimed freedom of speech in Parliament, as a matter of course; that is, they were not to be responsible for their motions and debates to the servants of the Crown *pro tempore*. This was a natural result of their position as members of a supreme council of the Crown, when in private deliberation. When party passion in 20 Richard II. had brought about Harley's condemnation in consequence of an obnoxious motion in the Lower House, his sentence was delayed on the motion of the prelates, and was shortly afterwards declared null and void, as incompatible with the usage of Parliament. (4°)

(4°) Evidently the long reign of Edward III., with its frequent demands for subsidies and its frequent parliaments, had given the commons a sure feeling of their independence (Peers' Report, i. 335, 336). They had in this half century advanced about as much as the prelates and barons in the half century under Henry III. In 5 Richard II. an order of attendance was issued for the whole Parliament. In 2 Henry IV. the procedure already moved within the broad lines of the relation now subsisting between the two Houses (Report, i. 305). In the stat. 7 Henry IV., touching the devolution of the crown upon the eldest son of Henry IV., the commons were described as *Procuratores et Attornati* of all counties, towns, and of "the whole people of the kingdom," and the enactment passed as having been passed "*per Universitates et Communitates*" of the above-mentioned counties, towns, and "the whole people of the kingdom, legally constituted according to the style, manner, and observance of the

realm" (Report, i. 355). From Richard II.'s deposition evidently dates the idea of regarding the prelates as the first estate of the realm, the temporal lords as the second estate of the realm, the deputies of the counties and towns as the third estate, who in this form are the representatives of the whole people (Report, i. 357). The altered character is shown also in the longer duration of Parliament, which in 8 Henry IV., with sundry prorogations, lasts almost a whole year, to the great grievance of the country, by reason of the daily salaries that had to be paid.

(4°) Hallam writes appropriately on this point (iii. 102). "No privilege of the Commons can be so fundamental as liberty of speech. This is claimed at the opening of every Parliament by their speaker, and could never be infringed without shaking the ramparts of the constitution." Once in the later period of Henry the Sixth's reign, a complaint occurs as to Thomas Young, who was confined in the Tower for a



V. Finally, from this process of formation arose also the active and passive rights of election and qualification for the Lower House. That these rights of election did not become the subject of legal declaration until after the lapse of a century, is explained by the fact that Edward I. issued the first summonses of his own personal choice, and that the Commons were at first only considered as deliberative estates, as well as by the fact that the concession of taking their consent to the taxes was only made later, and then intentionally in a vague form including the whole *communitas*. As, by custom of Parliament, the summons by royal writ was hitherto considered sufficient to cause all the vassals of the Crown to be represented for the purpose of their money grants, it was consequently considered a prerogative appertaining to the King to decree by writ whether and how the counties and towns should be summoned so as to form supplementary tax-granting and deliberative assemblies. The character of the summons indeed changed very slowly. The determining of the bodies to be summoned, and of the active and passive rights of election, runs parallel to the gradual formation of the hereditary estates of the realm; and even after the bodies had become consolidated the prerogative of adding newly created boroughs still remains.

In the summons of the counties this arbitrary character shows itself also in the varying number of the knights they were to send to Parliament. In 18 Edward I. the sheriffs were ordered to send two or three knights *de discretioribus*, in which arrangement a voting according to majorities was evidently not as yet contemplated (Report, i. 197). But in consequence of the daily allowances to be paid, the smallest representative number of two became early the customary one. In 28 Edward I. "three knights or others" were summoned to a discussion touching the carrying out of the provisions of Magna Charta. In 29 Edward I. and 5 Edward II. the order was issued to send the same knights and the same burgesses that had been elected in the last Parliament. As a rule, however, on every prorogation new writs were deemed necessary, and when these new writs were issued, the number of those summoned often again varies from the preceding one (Parry, 70). In 26 Edward III. the order was issued to send only one knight from each shire, because of the harvest. In 11 Richard II. the sheriffs were commanded to send such loyally disposed knights as were "*in debatis moder-*

speech made in the Lower House. This incident, too, was disavowed in later parliaments, and has been probably omitted in Hatsell's Precedents, because

it took place in the disorderly times of the wars of the Roses that were then beginning.

*nis magis indifferentes ;*" the clause was, however, withdrawn as being "*contra formam electionis antiquitus usitatas et contra libertatem dominorum et communitatum,*" etc. (Parl. Hist., i. 410). From that time the number of knights of the shire was definitely fixed at two, and in like manner the number of counties to be thus represented at thirty-seven. Chester and Durham were still excluded as being Counties Palatine. Lancaster retained its two deputies, as it had already exercised this right before its elevation to a County Palatine. In 15 Edward II., on one occasion, twenty-four representatives were summoned for South Wales, and twenty-four for North Wales, but this summons was not repeated under the same reign, and was in later times only occasionally renewed.

For analogous reasons there was for a long time no mention of a legal limitation of the electoral body. When Edward I. summoned his faithful Commons for the first time, they were existing corporations who, according to law and custom, had certain military, legal, and police services to perform, and had to raise from among themselves certain taxes. It was accordingly understood that these bodies were summoned in the manner in which, in accordance with the constitution, they discharged their public business in their county court, to which the towns had originally to send representatives in the persons of twelve burgesses. The formal election of the municipal members took place in the county assembly, and the report as to the result of the election was included in the same document as that touching the election of the knights of the shire. The election *in pleno comitatu* included also the boroughs as outlying districts, just as, from time immemorial, had been the case in the Norman administration, where the burghs had been regarded as "special farms" in the *comitatus*. Probably a deputation of the burgesses from the several cities either notified to the sheriff the election they had made, or they reported to him the election which had previously taken place in the municipal assembly. The latter course was probably the rule in towns with a comparatively organized municipal constitution (Stubbs, iii. 414). The voting in the county assembly was naturally regulated according to the suit of court. The judicial system had certainly from time immemorial been identical with the civil constitution. The deputing of two knights appeared as one of the many transactions which could be undertaken by the county assembly in the same manner as other business; of course "*in pleno comitatu de consilio et voluntate eorum de comitatu*" as is expressed in a writ of 4 Henry IV.

The county assembly of those times, however, when compared with that of the former period, appeared in a somewhat

decayed state. The *placita coronæ* had been taken from it, and now followed another course. Suitors could still act in civil actions; but the competition of the central courts and the itinerant justices had also encroached upon this jurisdiction in civil matters, and confined it to the less important cases. The periodical county courts were accordingly only occupied in general with taxation and military business, and with other matters of an administrative nature, and were therefore only poorly and irregularly attended; the court was in fact a district assembly, at which, in accordance with other analogies, the knighthood had almost exclusively the power to dictate, and most matters were settled more by acclamation than by a formal vote. The really burdensome suit of court had meanwhile passed to the civil assizes, with their juries composed of knights and forty-shilling freeholders; in criminal matters such suit had likewise passed to the assizes of the itinerant justices with their presentment and petty juries, formed out of the hundred. After the middle of the fourteenth century there were added to these the grand jury, for the most part composed of landed proprietors; and the office of justice of the peace was occupied by almost the same class. The suitors, who were now summoned in the character of jurors, were, however, no longer summoned as such to attend the county court. Failing special instructions, the sheriff could give notice to all freeholders, and summon such as were bound, as suitors, to suit of court. He might only summon his special friends, or might give notice to no one in particular, so that the election took place in the presence of a few who were by chance present. "The subject is obscure, and the customs were probably various" (Stubbs, iii. 406 note). However, this obscurity was unmistakably favourable to the influence of the sheriff and the smaller groups of the great landed proprietors. Complaints were made that the elections were often held by only a few magnates, and frequently by the sheriff at will; sometimes, by reason of riotous proceedings, no election was made at all.

Such an incongruous form of the electoral body might be disregarded, so long as the summons to Parliament appeared as a burdensome duty thrown upon the tax-payers. It was not until the rule of the house of Lancaster that the real situation of affairs attained its final settlement after still more important party struggles; and at the same time appeared those statutes which were natural at such a juncture. By 7 Henry IV. c. 15 it was ordered that arbitrary and partial action by the sheriffs should cease, and that in the county court next held after receipt of the writ, the election act should be proclaimed in full court, and performed by all

present, alike by those suitors who had been specially summoned, as by all the rest of the suitors who were present on the occasion. The sheriff was to draw up a document, to which should be affixed the seals of all who took part in the election proceedings. The document was then to be attached to the election writ, and sent into Chancery as the official return of the sheriff; and the Crown was to be thus enabled, by examination of the document, to ascertain what persons took part in the election. In the draft of the bill there was contained a further clause, which provided that in the writs addressed to the sheriffs there should be contained instructions for the making of a proclamation in all market towns to the place of election, before the day fixed for such election. But although sanctioned by the King, and resolved by the council, this clause was omitted from the statute itself—hardly by accident!

Shortly afterwards, certain provisions were made touching the settlement of election disputes. An Act of Parliament of the year 1410 (11 Henry IV. c. 1) gave the justices of assize the right of scrutinizing every return, fining the sheriffs £100 for violation of the law, and declaring the daily allowances of such members as had been unduly elected, forfeited. A later statute, 6 Henry VI. c. 4, allowed the sheriff and the knight of the shire, on being accused, an appeal against the decision of the justices of assize. Touching the validity of the election itself, it appears that the King himself "in council," or with the advice of the justices, finally decided the matter. A claim of the Lower House to exercise this right was only expressly raised in the year 1586, and even in 1604 the question was acknowledged as a disputed one between the Lower House and Chancery.

Meanwhile the uncertainty and incongruity of the participation in the county assembly had continued. As a matter of right all *liberi tenentes* who were, according to the old judicial system, summoned as suitors, even though only as supplementary suitors, were entitled to take part in the proceedings. As a matter of fact, in ordinary times only a very small number availed themselves of their right. But in case such an election was expressly announced, or made publicly known, or in case a great question of the day was involved, mass meetings were held of the common people, who did not take part in the active service of the jury, but only appeared *ad hoc*, and who seemed in consequence "unknown" common people to the freeholders who customarily attended. Such was the actual condition of affairs as described in the preamble to the statute which was now passed. In consideration whereof, and in conformity with the old principle, that only those who participated in *scot and lot* should exercise a right

of this kind, it was enacted in 8 Henry VI. c. 7 that for the future only freeholders of forty shillings yearly income should take part at elections; according to 10 Henry VI. c. 2 only forty-shilling freeholders within the county. Thus the right of electing is again traced back to the normal principle of service of court, which had been for more than a generation limited on the same scale as the service on juries.

The same fundamental idea is also instrumental in determining the qualification of the elected. It was first of all declared in c. 1 of Henry V. to be a matter of course that the elected as well as the electors must both be resident in the county, as it was the county community that was summoned as such to choose its representative. But, as it was a question of an assembly of the *meliores terræ*, it was at first regarded as a matter of course that knights of the shire should be elected, although no difference was observed between Crown and mesne vassals, for the reasons already explained. But since a great number of the tenants of knights' fees were wont to refuse to take up their knighthood, and preferred to pay the dues for default, at an early date esquires (*valetti*) had to be deemed sufficient for the office, and the sheriffs were accordingly instructed to see that *milites seu alii de comitatu* were elected (for example, in 1322). As early as the year 1325 there were among the knights of the shire only twenty-seven who had actually received knighthood. Yet the description *duos milites gladiis cinctos magis idoneos et discretos* continued to be long employed in the writ of election; which designation, however, in practice included the esquires. The actual practice was accordingly declared law, by Henry VI. c. 15, which provided that only notable knights should be chosen, and such notable esquires and gentlemen of the county as could become knights, but no yeomen or men of lower rank than these—which is almost in accordance with the qualification for the office of justice of the peace; indeed, in this period the *custodes pacis* regularly appear as knights of the shire, and *vice versâ*. This principle remained in force for four hundred years. (5<sup>a</sup>)

(5<sup>a</sup>) With regard to the mode of electing the knights of the shire, in 9 Edward II. *milites electi in pleno comitatu* are mentioned. In 50 Edward III. it was enacted that the knights be chosen *communi assensu* of the whole county. This appears to be the first declaration of the kind (Rep., i. 329). Then follows in 7 Henry IV. an express ordinance touching the elections in *pleno comitatu*; in 1 Henry V., touching the residence of the candi-

dates for election; in 8 Henry VI., touching the qualification of the county electors; in 24 Henry VI., touching the notables to be elected in the counties. From that time (1446) the qualifications of the electors were expressed in the writs in accord with the letter of the ordinances. According to the stat. 7 Henry IV., the number of the electors signing the return is remarkably small. The number of those affixing their seals is frequently only

The selection of the municipal elective bodies remained, by reason of the variety of these conditions, perfectly discretionary for a whole century. Under Edward I., one hundred and sixty-five cities, towns, and boroughs, were successively summoned to Parliament; at first, in 1283, twenty-one; in 1295, ninety-four more; in 1298, twelve more; in 1299, one more; in 1300, nine; in 1302, nine; in 1304, thirteen; in 1306, six more. This list is drawn up from the parliamentary writs. According to Prynne, however, only one hundred and seven cities and boroughs really chose and sent members to Parliament. In the years from 1382 to 1454 the average number was ninety-nine (Stubbs, iii. 448). No other principle can be here perceived than that those cities were summoned which were liable to pay imposts to the King, and whose *tallagia* were originally assessed by the sheriff, and in later times by the itinerant justices. To avoid never-ending appeals, the more important were at first selected, and the summons was gradually extended to all towns whose *tallagia* were of importance to the Exchequer. Those which sent no deputies, after summons had been issued to them, were regarded as consenting. The chief reason for the very unequal distribution was probably that places which were important for maritime commerce or manufactures were especially preferred. A not unimportant consideration was also the greater or lesser distance from London. The important fact was that the towns, as a portion of the county, were ordinarily assessed only at one-fifteenth, whilst, as boroughs in the narrower sense, they were assessed at one-tenth. Other irregularities in the summons also appear. Occasionally the writ was issued directly to the mayors; but as a rule to the sheriff, who thereupon gave his further orders to the municipal authorities, and in so doing was wont to allow himself various kinds of licence. In 84 Edward I. one or two burgesses were summoned from each town in proportion as the borough was larger or smaller. As late as 26 Edward III. a summons was issued to the mayors and bailiffs of ten towns to send only one deputy because it was harvest time. The Cinque

twelve, sometimes only six, and in great counties only twenty-four or thirty, seldom more than forty (Stubbs, iii. 408). What and whom the knights of the shire properly represent appears at first doubtful. The expressions used about the middle of Edward the Second's reign tend to prove that they were regarded as fulfilling the clause of Magna Charta touching the collective summons of the lesser barons (Rep., i. 277). The endless disputes

as to the daily allowances show us how confused the conceptions of representation still were, and how they became still more confused in consequence of the dispute on this point (Rep., i. 336-338). It was only during the course of the fifteenth century that, owing to a more regular usage of the daily allowances, and to the declaratory statutes, matters became uniformly settled.

Ports were, down to Edward III., only occasionally summoned, and then for special business (Report, i. 215). In later times, too, we meet with certain fluctuations in the number of representatives, two, three, or four, especially for London and the Cinque Ports. It was not until the Lower House had become more firmly consolidated as a corporate body with its own Speaker, that the number of the representatives became fixed at two, and the number of the regularly summoned and represented towns became more permanent. At the close of Edward the Fourth's reign the number of towns was one hundred and twelve with two members from each. For London, after several fluctuations, four members were summoned after 1378. (5<sup>b</sup>)

The House of Commons consisted, then, at the close of the middle ages of the following elements :

1. Seventy-four "knights of the shire," as representatives of the thirty-seven counties, chosen from the knighthood with the concurrence of all land and freeholders bound to serve on juries (forty-shilling freeholders) ;

2. In addition to these, and as yet somewhat subordinate to them, at least two hundred deputies for more than one hundred cities and boroughs, elected in legal theory from among the burgesses paying scot and bearing lot, but in reality only from a smaller committee, namely, the body charged with conducting the civil and police administration.

VI. The Parliament as a whole, that is, after the addition to the *consilium* of the magnates of the *gents de la commune*, now forms a most extensive and supreme *consilium regis*, the leading features of which, as the "highest royal council," have been retained in the whole as well as in the several limbs.

(5<sup>b</sup>) In 40 Edward III., and in later times still more frequently, small towns make complaint touching the representation demanded of them on account of the higher assessment and costs (Report, i. 327). The contributions to the daily allowances of the representatives also furnished a matter of dispute to the towns. Occasionally, in addition to the ordinary parliaments, there were still more special summonings of civic deputies, as a rule merchants, to discuss regulations which specially concerned the seaports and trade, as in 10 Edward III., and then again in 10, 11, 13, 14, 16, 17, 19, 21, 23, 30 Edward III., etc. In 10 Edward III. this was called a *colloquium speciale* or *personale*. But with the advancement of the Commons to the position of enacting assemblies, such special deliberations die out. The method of

election in the boroughs was left to the very diversely fashioned municipal constitutions (Gneist, *Gesch. d. Self-Government*, 196 seq.). Sketches of the customs of individual boroughs at the election of their representatives are given by Stubbs (iii. 416-421). It follows from what he adduces that the question was regarded as dependent on local regulations until the following period, in which the elections and the scrutiny were claimed as being the right and duty of the House of Commons. Of the ordinances affecting the rights of election only the stat. 1 Henry V., touching the residence of the candidates for election, is applicable to the boroughs. "Die Geschichte des Wahlrechts zum Englischen Parlament" (Leipzig, 1885), by L. Piers, is a clever essay on the whole subject.

The King remains the *caput, principium et fons parliamenti*. He alone summons, opens, and closes the parliaments, the sittings of which are, as a rule, of short duration. An exceptional session of one hundred and fifty-nine days occurred in 1406; such a duration had been until then unheard of, and this session was felt as a severe burden in consequence of the daily allowances which had to be paid. For his daily salary, from about 7 Edward II., the county representative received as a rule four shillings, the town representative two shillings. But all deputies were soon regarded not only as representatives of their corporation, but as representatives of the whole country, an idea early founded upon the writ of summons *ad faciendum et consentiendum*.

As a fact, this *parlamentum* represented an organic combination of State and society, such as no constitution of estates on the Continent (in consequence of the different development of the feudal system and property interests) could attain to. The firm coherence subsisting between the magnates and the active political government of the realm had been brought about by the formation of the *Magnum Concilium*; that between the magnates and the knighthood by the established form of the county constitution, especially by the office of justice of the peace and the formation of a military force; that between the knighthood and the cities by the county constitution, the unity of the judicial system, the suit of court, the tax-paying interests, etc. The single defective point is in the unequal representation of the boroughs, and a want of coherence of the boroughs among themselves, whose spontaneous and varied organization much resembled the urban constitutions of Germany. This caused them to assume a subordinate position in Parliament, in spite of the far greater number of their representatives.

Yet, in spite of an often actually preponderating power in the Parliament, the formal subservience of the *Consilium Regis* to the person of the King remains unchanged. Under Richard II. it happened at a time of tumult that a parliament threatened to dissolve. But a threat that a parliament would convene itself without royal summons, or would sit permanently, or continue in permanent committees, or appoint and bind by oath its own officials (after the manner of the German provincial estates), never occurs during this period. Very valuable information on a series of details in the parliamentary mode of procedure has lately been furnished by the investigation of Stubbs (*Constitutional History*, vol. iii. c. 20, "Parliamentary Antiquities").

NOTE TO CHAPTER XXV.—The system of taxation is based upon the development of the Parliamentary gradual blending of older modes of



taxation. It is accordingly advisable to review once again the groups that were made subject to the taxes, with regard to their respective interests in the taxation. A valuable aid for this purpose is furnished by the compilation of all parliamentary money grants from Magna Charta down to the close of this period (altogether about one hundred and thirty annual grants) in Stubbs's Constitutional History (vol. iii., Index *sub. v.* "Taxes").

1. The *Crown vassals* had been for generations accustomed to pay scutages in lieu of personal military service. But if this was to be converted into a periodical tax for national necessities, it might be objected that the old feudal tax indeed placed all the knights' fees on an equality with each other, but that in reality the incomes were different and became ever more unequal. The *scutagia* accordingly were not fitted for a normal land-tax. If the scutages under Henry III. had become the ordinary scale for the money grants, this was attributable to the habit of adhering to the old registers. The knights' fees could not permanently escape a rectification of their valuation, that is, an assessment according to the present productive value, like all other landed properties. At the commencement of the reign of Edward II. such a valuation was made, and from that time the landowners in the counties were, as a rule, assessed proportionately. But Coke's assertion is not correct that after 8 Edward II. no *scutagium* at all was any longer raised; in the course of the fourteenth century this course was adopted several times in cases where the King in person took the field, for the last time apparently in 1386. In like manner an aid for knighting a son, and a dowry for a princess on the marriage of a royal daughter, continued to be exacted as a financial resource (Stubbs, ii. 522).

2. The tax-paying group of the *under-vassals and landed freeholders* stood in a relation which early brought them into union with the lower Crown vassals. The sub-vassal had originally to pay his *auxilia* and *scutagia* to the mesne lord, as often as the latter had to pay his to the King. But it was to the interest of the Crown rather to have the tax paid immediately by the tax-paying subject. From this inclination proceeded the statute *Quia Emptores*, 18 Edward I., which made every new purchaser of a fief an im-

mediate vassal, that is, an immediate tax-payer. The whole of Edward the First's reign shows a constant tendency to abolish, in the interest of the Crown, the difference between mediate and immediate vassals (Peers' Report, i. 248-250). All freehold estate in free socage was by custom considered liable to the *auxilia* in cases of honour and necessity (Rep., 322). Accordingly, so soon as the *auxilia* had been made the basis of taxation, a fairly uniform scale was attained for the whole of the provincial freehold estates. (Remarks as to the other varieties of tenures and aids are contained in the Peers' Report, i. 274, 275.) An impediment to a good understanding on this point appeared after the introduction of parliamentary elections, by the high allowances of the county representatives. The sub-vassals could object that they were represented by their mesne lords; but as that feudal relation more and more recedes, this difficulty is accordingly tacitly though slowly put aside. On the other hand, in the class of the petty freeholders, disputes are continually recurring. The more representation became developed, the more did contribution to the allowances become a chief characteristic of the tax-payer who was entitled to the suffrage, and on the other hand the knights of the shire became more assured in their functions as representatives of all persons who contribute to their salaries, viz. of (1) the lesser Crown vassals, (2) the sub-vassals, (3) the contributing freeholders of estates not liable to scutage. By the stat. 12 Richard II. c. 12 "custom" was held to decide the question. But so long as these relations were in process of creation, the deputies of the counties took counsel with their constituents (Rep., i. 308, 309), which transactions are characteristic of this early period of taxation. In some counties, as in Kent, divergent systems of contribution were maintained (Parry, 76). Still more divergent was the system of the Cinque Ports, which, in analogy to the military vassals, had onerous duties to fulfil *in natura*, in respect of sea defence, and so were excused from contributing to the aids, and on that account did not send representatives to Parliament until later.

3. The *boroughs* had been from time immemorial subjected to a comparatively arbitrary taxation. But the redemption of the tallages by fixed sums, the interest of the Crown in preserving

the prosperity of the towns, the actual necessity for an uniform system of taxation, all brought the municipal *tallagia* more and more to the level of the *auxilia* of the feudal vassals. In a clause of the first draft of Magna Charta this was even expressly laid down, but it was omitted at the first confirmation. The grants of tenths, fifteenths, and other income taxes were originally only made of "good-will." The resolute resistance, especially on the part of London, had aided in bringing about the *Confirmatio Chartarum* of 25 Edward I. The Crown, moreover, found that it attained better results through friendly negotiations. Here also there was originally a mixture of old obligation and new grant of "good-will." The Crown saw itself obliged to extend the summons to as many cities and boroughs as possible, for, when an understanding had been arrived at with the more influential towns, the smaller, which were summoned with them, yielded. After 6 Edward III. the old right to the municipal *tallagia* appears merged in the general grant of subsidies (Rep., i. 305, 306). But whilst this state of things was in a state of transition the representatives of the cities were frequently required to take counsel with their constituents, as in 13 Edward III. After the scale of taxation had been determined upon, these consultations fell into disuse.

4. The old *tenants in ancient demesne* found themselves in a state of dependence, in which an arbitrary right of the Crown to impose taxes was sure to last longest (Rep., i. 280). But for economical and legal reasons they might not be overburdened, and a parallel state of taxation had likewise to be applied to their case. Their deputies were frequently summoned to Parliament, but they were never allowed to meet with the commons, or to form a part of the Parliament. But the more they were accustomed to be placed as a matter of course upon an equal footing in respect of taxation with the freeholders and burgesses, the more did they blend with the tax-paying *communitas*, so that as early as 15 Edward II. the estates of the realm fulfil functions as representatives of the tenants in ancient demesne (Rep., i. 283). However, for some time the habit was adhered to of demanding *before* a campaign an *auxilium* of the tenants in ancient demesne, *after* the campaign

one-tenth or one-fifteenth, according as the previous *auxilium* had produced a greater or a smaller sum (Thomas, "Exchequer," p. 35). Also after the *Confirmatio Chartarum* Edward I. held fast to the principle that the taxation of his tenants in demesne was a manorial privilege, which continued without grant of Parliament. But in the year 1332 Edward III. promises that he will not for the future raise any *tallagia* otherwise than as in the time of his predecessors, and this is apparently the last instance of a raising of the *tallagia* in the way of a special taxation of *talliable* tenants (Stubbs, ii. 521).

5. After the bull of Urban the clergy refused at first all taxation for civil purposes. After Edward I. had broken through this refusal so far as based on principle, a difference was still maintained between the taxation of their baronies and their other income. For the taxing of the baronies the prelates meet together with the secular lords in the Upper House as representatives of the ecclesiastical military fiefs. For the other temporalities and spiritualities (tithes), negotiations were carried on again with the bishops and the representatives of the inferior clergy in convocation, and here also an equivalent *donum* was granted. According to the scale of Pope Nicolas (1291), the income of the clergy, exclusive of the baronies which were to be taxed by the prelates, was computed at not less than £199,311. The produce of a clerical tithe should accordingly have been, in round numbers, £20,000, but it gradually sank down, owing to numerous exemptions, especially that of the small livings under ten marks value. Under Henry VII. the amount was computed only at £10,000.

6. The system of *duties and indirect taxation* at the close of the former period has been discussed above. The financial administration saw itself still entitled, by virtue of the royal rights appertaining to harbours, fairs, and markets, to raise duties by special negotiation with the merchants, and to increase the same with the consent of the parties concerned, independently of any proceedings in Parliament. A parliamentary vote of 1275 granted to Edward I. a duty of a half mark per sack of wool, and on every three hundred fleeces, and one mark per load of leather as a legal duty. But the necessities of the year 1303 again led to an arrangement with the foreign

merchants for a duty of forty pence per sack, and one mark per load, at which the evasion of the *confirmatio chartarum* was excused by saying that the merchants were "foreigners." Under Edward III. (1328) the fixed duties became a portion of the ordinary revenues, and received a fresh sanction in the statute of Staples (1353). The irregularity of the impositions of duties upon the market produce of the country, the so-called staple commodities (wool, lead, tin) was, however, for a long time enhanced by the protective interests of the merchants themselves, who indemnified themselves for the higher rate of taxation through the interest they had in protection. Arbitrary confiscation of wares, such as took place in 1294 under Edward I., ended with a release on payment of three or five marks per sack of wool, for which the merchants could indemnify themselves by increasing the price. The system of privileged staple places, which was developed under the three Edwards, is based upon common financial and protective interests, the disadvantages of which for the consumers were only gradually appreciated. Under Edward III. commercial monopolies were alternately abolished and reinstated. In the year 1362 an Act of Parliament was passed, making every levy of a duty upon wool dependent upon the express sanction of Parliament. After the year 1373 the indirect taxes under the name of "tonnage and poundage" were subjected to a regular parliamentary grant.

After the recognition of the parliamentary right of assent, we still find in the *confirmatio chartarum* separate grants of taxes by the clergy, the barons, the counties, and frequently also by the tenants of royal demesnes, in proportions which, in the case of the barons and counties, are as a rule estimated lower than those of the others, out of regard to the considerable feudal imposts upon the baronies and the knights' fees. This proportional adjustment leads to the conclusion that with the assistance of the Assessment Commissions uniform taxes upon the returns of landed estates and personal income had been already arrived at. At intervals, besides all this, the king again puts forth fresh demands for equipment of soldiers, performances in kind, and indirect taxes of all sorts, in consideration of which a reduction is often made in the proportions. During those periods in which the monarchy

was weak, and the influence of the magnates and the great landed proprietors in the ascendant, the landed interests tried indirect taxes by way of experiment, and for a time even a poll-tax. The following incidents will perhaps suffice to illustrate the fluctuations. In 9 Edward II. the barons and counties vote from every *villa* in the kingdom one foot soldier, with accoutrements and pay (later changed into a tax of one-tenth); for this boroughs and demesnes yield in the next parliament one-fifteenth. In 10 Edward III. the grant was supplemented by a tax of forty shillings for every sack of wool exported by English merchants, £8 when by foreign merchants. In 13 Edward III. the earls and barons vote for themselves and for "their peers of the land, who hold by barony," the tenth sheepskin and lamb from their demesnes; the commons 2500 sacks of wool. In 14 Edward III. the prelates and the barons vote for themselves and their vassals, the ninth sheepskin and lamb for two years; the knights of the shire for themselves and the *communes de la terre* the same; the boroughs the actual ninth part of their personal property; those merchants who did not reside in boroughs, and the other inhabitants of forests and wastes one-fifteenth. In 20 Edward III. an *auxilium* of forty shillings was raised for knighting the Prince of Wales, although the Commons, according to the statute of Westminster only concede twenty shillings, and refuse their consent. In 45 Edward III. both Houses vote a subsidy of £50,000, and in like manner the clergy an aid of £50,000. In the case of the first it was presupposed that each parish paid 22s. 3d.; but the number of the parishes had been so grossly miscalculated that shortly afterwards a small committee was summoned, which granted one hundred and six shillings for each parish, to produce the sum of £50,000. In 46 Edward III. the indefiniteness of the systems was once more shown in the fact that the knights of the shire were dismissed, but the representatives of the boroughs were retained and prevailed upon to vote certain dues upon wine and goods for another year (Parry, 133). Even at the close of this reign all reservations had not yet been given up. In 51 Edward III. it is declared that it is not the King's will to impose any burden upon the people, without the consent of the Commons,

except in cases of great necessity and for the protection of the realm, and where he can do so of right ("Parl. Hist.," i. 328).

After 8 Edward III. a definite scale of taxation for counties and towns had at least been agreed upon, which simplified the business of voting supplies. According to the estimates of this year the tenths and fifteenths for the laity were assessed in round sums, the separate distribution of which among the individual tax-payers was effected by the committees of assessment. The tendency constantly pursued from that time to pay fixed sums in satisfaction of the claim, leads to a continual reduction in the tax returns. So early as in the fifteenth century the sum produced by a tenth and fifteenth on the laity was only about £37,000; in the year 1497 the returns had sunk to £30,000, and that of the clerical tithe to £10,000 (Stubbs, ii. 550). The Commons shortly afterwards introduce the custom of requesting a deputation of the lords and prelates to deliberate with them. For instance, in 47 Edward III., on their motion, a number of bishops and lords had been appointed. In the full sittings that ensued, they deliver their written consent, beginning with the words, "The Lords and Commons of England have in their present Parliament granted the King a fifteenth," etc. (Rep., App., iv. 659-662). This conference with deputies from the Upper House now became for a time the ordinary form of proceeding. As a rule the Commons themselves appoint those persons who are agreeable to them. In 6 Richard II. they choose three prelates, three earls, and three barons; their petition was granted with the proviso that it was a matter for the King's selection to appoint such bishops and lords as he shall find fitting, or others whom he shall himself nominate (similarly in 4 Henry IV.). In 7 Richard II. the Commons, "with the consent of the Lords," vote two-fifteenths; then again in the same year Lords and Commons together a half-tenth and a fifteenth. In 21 Richard II. the Lords and Commons made the King a considerable grant, even for his life (which happens once again in 3 Henry V.). In 13 Henry IV. the Commons, with consent of the Bishops and Lords, vote a subsidy wherein the contributions from real estate were plainly described as being a land-tax ("Parl. Hist.," ii. 119).

Grant of the Commons with the assent of the Bishops and Lords became from this time forth the most usual formula, particularly in 3, 4, 5 Henry V.; 18 Henry VI.; 28 Edward IV. Apart from the phraseology, which still varies, the instability of the system of taxation, and the inexperience of the taxpayers, is shown in numerous experiments in taxation. The curious grant of a uniform sum from each parish in 45 Edward III., on which occasion Parliament had assumed five times as many parishes as in reality existed, has been already mentioned. In 51 Edward III. the Lords and Commons grant a poll-tax of fourpence upon all male and female persons above fourteen years of age, except beggars, with the excuse that they could not at this time grant more. This mistake of the upper classes was repeated early during the minority of Richard II., and led to the violent uprising of the labouring classes, after which the unfortunate poll-tax does not again occur. In 5 Richard II. a subsidy on the wool was again granted.

Under the house of Lancaster the contributions from real estate and from personality still more regularly diminished. Under Henry VI., however, the influence of the regency, and later of the absolute impotence of the monarchy was again visible in new experiments in new taxation. In the Parliament of 1427-1428 a new and more complicated method of taxation appears; all parishes whose churches were rated at more than ten marks were to pay 13s. 4d.; smaller parishes 6s. 8d., the smallest parishes 2s., payable by the members of the community; from each knight's fee 6s. 8d. In the year 1435 a progressive income-tax was introduced: incomes of a hundred shillings pay 2s. 6d., and 6d. additional for every pound up to £100; those of more than £100 pay 8d. in every pound; above £400, 2s. in the pound. Analogous grants were made by the clergy in convocation. In the year 1439 the grant is made of one-fifteenth and three-twentieths, supplemented by a tax upon foreigners, 16d. upon householders, and 6d. poll-tax upon individuals. Under the house of Lancaster the ordinary revenue of the King had much diminished, in consequence of the stricter conformity of the administration with the law, and the numerous limitations of the Crown in its financial and other profitable rights

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and arbitrary powers; and the Duchy of Lancaster, which had been made a royal entailed estate, brought only a small surplus, in consequence of numerous permanent burdens laid upon it; whilst the wars in France and in later times the defence of the remnants of the English possessions in France, caused the Crown considerable expense. According to Lord Cromwell's statement of 1483 the ordinary revenue still available had, owing to fixed burdens, become reduced from £23,000 to £8990. The Duchy of Lancaster brought in only £2108 nett; the indirect taxes upon wine and other commodities brought in £26,966. The expenses of the garrison of Calais, on the other hand, alone exceed the ordinary revenue of the Crown (Stubbs, iii. 117). To this period belong also precedents of an authorization to contract loans. With the assistance of his council the King was empowered to borrow money by warrants under his privy seal. Frequently, too, the members of the council advanced money from their own resources, or gave personal security to the merchants who lent it. At difficult junctures they were empowered by Parliament to give security for great loans, by pledging the taxes which were due. After 1421 the sum for which the council should be authorized to give security was generally limited, the amount being from £20,000 to £100,000. After the death of Cardinal Beaufort these transactions disappear.

During the wars of the Roses financial embarrassments, as may be well understood, had become permanent. Under Edward IV. new extraordinary imposts were accordingly introduced. The Parliament of 1472 granted an army of 13,000 archers, to be paid at the rate of sixpence a-day for a year. The Commons and Lords, in two separate documents, further resolved that a new and full tenth should be levied upon all property and income to defray the expenses. In the following year, however, this was found too difficult to collect, and so a fifteenth was voted after the old fashion. In the same year begin exactions by way of benevolences (forced gifts from private individuals), which soon became odious. In the following year (1474) the grant appears in a round sum.

It was not until the royal power had become completely restored under the dynasty of the Tudors that the system of direct taxes, as land-tax and income-tax, was completed, put into regular execution, and permanently established. Under Henry VIII. the grant in 1514 rises to £160,000, according to a carefully graduated scale from land, personal property and income. Under Mary the expressions subsidies, incomes, tenths, and fifteenths acquire definite technical meaning, the subsidy as a land-tax of twenty per cent. (4s. in the £), the tenths and fifteenths as an income-tax of thirteen one-third per cent. (2s. 8d. in the £) (Stubbs, iii. 355).

## CHAPTER XXVI.

*The Church at the Close of the Middle Ages.*

THE thorough remodelling of the State in this period is confined to temporal interests, and to the legal relations subsisting between the laity and the royal power. The Church remains unchanged in the face of this metamorphosis, and includes all classes in a constitution of which the form differs greatly from the spirit. At the close of the preceding period the power of the Roman Catholic Church had reached its zenith, at which point it had become a compact political system.

A sovereign Head of the Church confronts the temporal King, and in England claims even a feudal suzerainty with a feudal tribute to be paid annually.

A spiritual parliament, with an upper and a lower house (convocation), confronts the secular parliament.

An exclusive ecclesiastical legislation, grant of taxation, and jurisdiction stand firmly opposed to that of the temporal power. This jurisdiction, in the ecclesiastical sense, embraces a system analogous to that of our modern administration, executed by professional officials with a bureaucratic constitution. Moreover, the most important temporal offices of Lord Chancellor, Master of the Rolls, Keeper of the Privy Seal, and not unfrequently that of the Lord Treasurer, were still in the hands of clerics.

Both political systems now rank side by side, each to a great extent requiring the help of the other, each supplying the other's deficiencies, both embracing all classes of the population. The great wealth of the Church (1) at first

(1) "The clergy were, as a body, very rich; the proportion of direct taxation borne by them amounted to nearly a third of the whole direct taxation of the nation; they possessed in the constitution of Parliament and convocation a great amount of political power, a majority in the House of Lords, a recognized organization as an estate of Parliament, two taxing legislating assemblies in the provincial

convocations; they had on their great estates jurisdictions and franchises equal to those of the great nobles, and in the spiritual courts a whole system of judicature parallel to the temporal judicature—but more inquisitorial, more deeply penetrating and taking cognizance of every act and every relation of men's lives. They had great immunities also, and a corporate cohesion which gave strength and dignity

attracted all classes of the community to her service. The number of the *clerici* was accordingly extremely large; the lists of ordinations in the greater dioceses often show hundreds of persons who in the course of a single year had received the higher consecration. Almost every family had relations among the lower clergy, the country squire counted kinsmen among the canons of the greater foundations, whilst the higher nobles and officers of State strove to gain episcopal sees for their sons who were dedicated to the clerical profession; even the bondsman class found a place open to it, in spite of legal prohibition. Among the lower classes, the influence of the Church became even more extensive, now that the orders of mendicant friars had entered into bonds of sympathy with the poor, who, in very many matters, found reason for being discontented with the laws and measures of taxation established by the wealthy. The bureaucracy of the Church, with its standing army of monks and spiritual orders, had developed itself into a steadily working system of dominion over the human mind. No temporal rule could, for any length of time, maintain itself in hostility to such a power as this, which swayed the masses, and continually admonished them to obey the divinely appointed ruler. As the Church, on the one hand, extended her consecration to the monarchy, so, on the other hand, she guaranteed the rights of the estates, and from a like interest as the nobility, held fast to *Magna Charta*, the confirmation of which instrument was repeatedly brought about by the higher ecclesiastics. Their judgment it is which makes constitutional oaths binding, and theirs also which in turn releases from them. (2)

This mutual relation also finds expression in the parliamentary constitution. In it the estate of the prelates did not, as on the Continent, appear as a mere representation of manorial rights, but as summoned by royal writ to the highest deliberative, judicial and tax-imposing assembly. But the royal right of summons had a different significance for the ecclesiastics and for the barons. The summons of

to the meanest member of the class (Stubbs, iii. 365, 366). The estates of the bishops and monasteries extended into almost all the sub-districts of the country. They were well managed; the Cistercians especially were regarded as good farmers and sheep breeders. The Church appeared everywhere to the country people as a generous landlord. (See Stubbs, iii. chap. xix., touching the whole relations between Church and State.)

(2) The state of things in this period was certainly somewhat different to

that in the preceding. In former times the clergy simply preached obedience towards the King, but the clergy was now always ready to quote instances of "Kings like Saul and Herod" in the disputes between Church and State on matters of jurisdiction; and it was no easy task to determine "what was to be rendered to God and what to Cæsar," according to the preachers' ideas. There had unmistakably come about a cooler relation to the monarchy on this side (Stubbs, iii. 513).

the bishops resulted naturally from their constitutional position as pillars of the ecclesiastical power, and elevation to the bench of prelates was after King John's reign no mere grant of favour. The clerical caste for a long time nominated its rulers by free canonical election, and made the grant of the temporalities a mere confirmation on the part of the King. The caste spirit created by the celibacy of the clergy kept the prelates more closely united than the secular magnates. The privilege of clergy made them personally much more independent than the temporal lords. It was accordingly an advantage of this administration of the realm, that the benches of the bishops and the temporal lords could not, at all events, form two independent chambers, as was the case on the Continent, where the landed interests had become the basis of the estates of the realm. The claims advanced by the bishops were moderated by the voices of the barons, and the martial insolence of the great temporal lords kept in check by the votes of the spiritual magnates, who, according to the parliamentary writs, even formed the majority, though they did not always appear in such numbers. Most beneficial of all for both parties was the customary co-operation of the prelates and barons in the great council, in conducting the responsible business of the central government.

In accordance with his experiments at a political government on a great scale, the aim of Edward I. is directed towards summoning the chapters and the parsons of parishes to Parliament in addition to the prelates, in order to have the ecclesiastical middle class duly represented, and to bring about an understanding with the *gentz de la commune*. The immediate occasion for this was certainly given by the system of taxation; but the consistent enforcement of this measure and the systematic opposition of the clergy to it, proves that the royal council recognized in it a politically important measure. At first, to combat the papal prohibition of taxes, Edward I. was desirous of giving the inferior clergy a position analogous to that of the Commons, with a view to arousing and keeping alive in them a feeling for the common weal. Consequently an instruction, bearing the introductory words *Præmunientes*, (8) was addressed to all the bishops, enjoining

(8) Since 23 Edward I. the writ issued to the Archbishop of Canterbury runs as follows: "*Sicut Lex justissima, provida circumspectione sacrorum principum stabilita, hortatur et statuit, ut quod omnes tangit, ab omnibus approbetur, sic et innuit evidenter, ut communibus periculis pro (per?) remedia provis-*

*communitur obviatur. . . . Præmunientes Priorem et Capitulum Ecclesie vestre, Archidiaconum, totumque Clerum vestri Dioc. facientes, quod idem Prior et Archidiaconus in propriis personis suis, et dictum Capitulum per unum, idemque Clerus per Procuratores duos idoneos, plenam et sufficientem potestatem ab*



them to summon to the national assembly the deans and archdeacons in person, to represent each chapter by one, and the clergy of each diocese by two deputies, who were to increase the Parliament by about one hundred ecclesiastical members, and deliberate in the same manner as knights and citizens. But there immediately arose a violent opposition against this method of voting the taxes jointly with the laity, and against this kind of summons. In 7 Edward II. the clergy declares it not to be usual that they should be summoned under the authority of the King, and that they ought not legally to be so summoned. For the next Parliament a second missive was for the first time addressed to the Archbishop of Canterbury, with a repetition of the order to appear. Still the clergy in 8 Edward II. protest even against this indirect citation. They describe the Parliament as a *curia singularis*—begun and continued in the King's *camera*,—and to such a *curia* the clergy could not be summoned without a manifest infringement of their privileges. They make at this time their grant of subsidies dependent upon a previous papal mandate of authorization, such as in 13 Edward II. had allowed the grant of a tenth for a year ("Parl. Hist.," i. 159, 177). In 15 Edward II., in two convocations, they vote once again an aid "in obedience to the authority of the apostolic chair." In 16 Edward II. every further money grant without this

*ipsis Capitulo et clero habentes, una vobiscum intersint, modis omnibus, tunc ibidem ad tractandum, ordinandum et faciendum, nobiscum et cum cæteris Prelatis et Proceribus, et aliis Incolis regni nostri, qualiter sit hujusmodi periculis et excoꝑtatis malitiis obviandum."*

The pattern for this formula is met with as early as 22 Edward I. in the writs of summons to a convocation ("Parl. Writs," i. 19). The clergy in this assembly assesses itself on account of its tenures in frankalmoign, on account of its glebe lands, and its personal property. The prelates also in the spiritual assembly vote the amount of the tax only upon their spiritualities, whilst their feudal estates grant the common aids together with the barons in Parliament (Rep., i. 214). The clause *Præmunientes* was retained in the same sense after 23 Edward I. without material alteration, yet not always added. But from the first the clergy showed a strong resistance to the royal summons, and therefore in the years 1314–1340 a separate circular was addressed to both archbishops, urging them on their part to provide for the appearance of the clerical profession in

the parliaments. After 1340 the Crown was content with the practice, that the clerical tithes should be voted in the provincial synods, and henceforward laid less weight upon the appearance of the lower clergy in Parliament (Stubbs, iii. 320). With regard to the papal prohibition of the taxation of a clerical income a fiction was resorted to; namely, that the clerical grants were made of "free will," and since the clergy besides shared the higher rate with the cities (generally one-tenth where the counties pay one-fifteenth), this taxation gave less reason for irritation. The convocations as a rule determined likewise to pay the rate voted by the cities, without further dispute. About the same time the oppression of the papal taxation ceased, which had been severely felt in the century of the three Edwards. After the popes had taken up their residence at Avignon, this pressure became lighter, and Richard II. was enabled to directly forbid the exaction of a papal impost (1389). The feudal tribute promised by John had been already abolished by resolution of Parliament in the year 1366.

authority was plainly refused (Peers' Report, i. 284). In 17 Edward II., the King finds himself obliged to entreat the two archbishops to convene a convocation. In the course of the dispute, however, this opposition was overcome with the assistance of Parliament, after the Crown had agreed, in addition to the writ of summons addressed to the bishops, to issue another and special summons to the archbishop. Only the latter, as being an ecclesiastical authority, was obeyed, and as being a summons to a "convocation" and not to Parliament—whereby an appointment of time and place was very often made differing from those contained in the royal writ. The representatives of the lower clergy only appear as members of their spiritual synod, and not as members of Parliament. With this rule the writ of summons (*Præmunientes*) became after Edward III. the regular formula. (4)

In these proceedings lay a grand attempt to effect the union of all ranks, but also a proof of the truth that no assembly of estates can have any foundation without legal equality. In the Upper House that equality existed for prelates and barons by feudal tenure and royal summons, and above all by their customary co-operation in the central government,—they accordingly cleave together; the inferior clergy, knights, and citizens, however, do not. The more firmly knights and citizens as commoners are welded together in the Lower House, the more do the aspiring middle classes appear to become estranged from the clergy. A blending of the temporal middle classes with the inferior clergy could scarcely be effected in the face of the utter difference in their way of life, their educa-

(4) The words employed in 11 Edward III. and in later times repeated in the second missive addressed to the archbishops: "*justum et consonum rationi, ut per communia subsidia communibus periculis occurratur*," found in Parliament as well as in the country an echo, which the clergy was not able permanently to ignore. In 18 Edward III. for the first time the grants of convocation were entered upon the parliamentary rolls, and finally fixed in the form of a statute (Rep., i. 317). The existence of separate money-voting assemblies led, however, for some time longer to conflicts. For instance, in 4 Richard II., the Commons propose 100,000 marks, if the clergy (who possessed one-third of the kingdom) would grant 50,000 marks. The clergy answered that their grant had never been made in Parliament, nor should it be so; the laity should not and could not bind the clergy, nor the clergy the laity; the Commons might do their

own business, and they would do the same. In 9 Richard II. the granting of a vote of subsidies under the condition that the clergy should vote a certain sum, led to similar protests ("Parl. Hist.," i. 384). But as Parliament would not give up its privilege of confirming the taxes which had been voted by the convocation, so the Parliament also claimed that its statutes should bind the clergy, "like the statutes of all Christian princes in the early centuries of the Church." The question never came to a constitutional settlement, for the conflict was appeased in the fifteenth century by the money grants of the clergy being made in a separate assembly. But on that very account the King was obliged to derive the duty of the bishops and abbots to appear in the Upper House from their feudal duties, and had therefore, for consistency's sake, to dispense with the attendance of abbots who held no fees of the Crown.

tion, and social interests ; least of all was this possible with the celibate clergy of the Roman Catholic Church. The Commons in Parliament reply to the energetic efforts of the clergy towards separation with an equally keen jealousy of ecclesiastical rule, so far as it appeared as the government of a foreign ruler ; and this jealousy had become still more enhanced since the migration of the Popes to Avignon.

In this crisis the monarchy gains an ascendancy, at first in all points, where the privileges of the Church come into conflict with the common law. The King had now a Parliament to help him, which began to watch with jealousy over national honour and independence. The Church was allowed full sway in those departments which did not immediately affect the common law, such as marriage law, wills, ecclesiastical offences, and in the Chancery courts, and those of the Universities and the Admiralty. But every attempt to change the common law (such as by introducing legitimation, contracts of married women, etc.) was firmly rejected. "*Nolumus leges Angliæ mutari*," the barons had already replied at the Parliament of Merton (20 Henry III.). When in 1296 the clergy began on principle to refuse their contributions to the national taxes, Edward could venture to declare the Church beyond the pale of his feudal and judicial protection. On a similar occasion the Parliament declared, in 1301, that the Pope had not the right to interfere with the temporal affairs of the Crown, and that they would not permit the King, even if he were so inclined, to concede any one of the papal claims. But most zealously did the peers and commons side, as was natural, with the monarchy in the dispute touching the taxation. When Urban V. went so far as to renew the claim to feudal suzerainty and feudal rents, Edward III. unreservedly withdrew from the old relation of papal protection, and asserted, in conjunction with the estates, the independence at once of the country and of the national Church. Under the same reign, repeated motions of the Lower House against the clergy followed, and a petition that no ordinance be issued on the motion of the clergy, and that the former should not be bound by regulations which the latter made for their own advantage. In 1371 the proposal was even made to remove all clergy from the high offices of State, and to fill these offices with laymen, which, in the case of the Chancellor and in the Treasury, was for a short time actually done. The Parliament of 1399 declared "the kingdom of England, as in all bygone times, free of all papal or other foreign interference." Under Richard a dislike to the clergy was shown, in the protection accorded to the heretics (Lollards) which in 1406 led to the proposal to withdraw all

such as were suspected of heresy from the episcopal jurisdiction. It was not until Henry IV. that the Church obtained from the State more rigorous penal laws against the heretics, in spite of the continued opposition of the Lower House. Under Henry V. heresy was declared an offence against the common law also; the secular arm did not merely lend assistance to the spiritual court, but the temporal courts were to exercise concurrent penal jurisdiction side by side with the spiritual. The house of Lancaster was too immediately dependent upon the support of the clergy, not to give way entirely in this point.

The visible result of these conflicts was a legal definition of the rights of the executive against the encroachments of the Church in the external provinces of law and taxation. As the ecclesiastical constitution stood pointedly opposed to the secular power, there was no other course open but to employ the temporal penal legislation against a series of definitely named excesses, which gradually form a connected system. The State, now governed by parliamentary statutes, did not relapse into the system of administrative compulsion by means of amerciaments, but achieved a firm and uniform observance of the limits of ecclesiastical power by decisions of the ordinary courts of justice in the form of parliamentary penal statutes, which were indeed rigorously framed according to the spirit of the Middle Ages, but were considerably mitigated in practice.

1. Under the general term *præmunire* a number of violations of the province of the secular state by the ecclesiastical power were threatened with severe penalties. The first statute, 27 Edward III. stat. 1, is directed against the citations to Rome in matters which belong to the cognizance of the royal court. The writs of "*præmunire facias*" which were issued with reference to this, and threaten banishment and severe corporal and pecuniary punishments pave the way for a series of statutes, which repeat the penalties of *præmunire* against the obtaining of ecclesiastical offices to the prejudice of the King or any one of his subjects, against the exportation of money to foreign parts, against the introduction of sentences of excommunication from foreign parts, against the exemption of clerical personages, against immunity from the liability to pay tithe, and finally against the interference of the Pope with ecclesiastical elections. The *præmunire* did not, however, prevent an action being brought in the papal court in cases where, according to common law, no action lay. On this question as on others a kind of compromise was effected between the Crown and the *Curia*. A royal veto was seldom exercised, but the appeals to Rome now seldom appear.

2. The *Statute of Provisors*, 25 Edward III. stat. 4, threatens

all persons who accept the grant of a benefice from the Pope with imprisonment and forfeiture by the nominee of all income arising from the office. The practical result was, however, here also a compromise between the Crown and the *Curia* at the expense of election by the chapter. In the case of a vacancy the King sent the chapter "his licence to proceed to the election," simultaneously with a letter, which pointed out the person whom the King, in case of their election, would accept. At the same time, the Pope was requested by letter to confirm the same person by papal provision. All repetitions of the statutes only led in practice to a division of the appointments between the King and the Pope. (5)

3. These are closely followed by supplementary statutes of a more special nature. For instance, in this year 1349, on a special occasion, an ordinance was issued with the consent of the barons and Commons, which prohibited the introduction, acceptance, and enforcement of papal bulls and other missives in the kingdom, and threatened all who contravened the order with arrest. This ordinance was not registered as a statute and remained unenforced, but was in later times in a revised form incorporated with the statute of *præmunire* (25 Edw. stat. 4). To the same series belong prohibitions of alienations in mortmain (7 Edw. I. stat. 2), partly of the era of Edward I., and later parliamentary enactments; *articuli cleri* (9 Edw. II. stat. 1) containing sixteen articles of griev-

(5) The free canonical election conceded by John met with an impediment in the faulty constitution of the English cathedral chapter, and became at first enveloped in a long series of controversies. In the years 1215-1264 not less than thirty contested elections of prelates were carried to Rome for final settlement. It was not until Gregory IX. had, in cases of this sort, rejected both candidates, and declaring the right of election forfeited had appointed a third, that the appeal to Rome became less frequent. But after Edward I. both King and Pope exercised their influence with such resolution, that for more than a century the right of election became almost ineffectual. From the commencement of the fifteenth century the papal claim assumed the form of a direct appointment (provision). Gregory IX. already had demanded of the bishops of Lincoln and Salisbury a "provision" of not less than three hundred foreign clergy; in later times Innocent IV., after the knighthood had begun to help themselves by driving away the foreign

*clerici*, had abandoned these direct claims in England. In the fourteenth century, however, the papal provisions and reservations again played an important part, though the Pope and the King usually came to an understanding, and a free election by the chapter was seldom effectual. It was Henry V. who first restored to the chapters their "free" election, whereupon Pope Martin V., in the course of two years, filled no less than thirteen episcopal sees by "provision." Under Henry VI. a kind of compromised division was resorted to, by virtue of which the King as a rule succeeded in appointing his nominees, and the Pope his Italian candidates. Under Henry VII. the King's nominees were without exception appointed. We must remember that in all these instances, the question lay in the background—"whether the King and nation should accept, at the Pope's dictation, the nomination of so large a portion of the House of Lords as the bishops really formed," which "would have placed the decision of national policy in foreign hands" (Stubbs, *iii*. 318).

ances set forth by the clergy touching secular interference, with the answers of the King in council having reference thereto; the statute 14 Edward III. stat. 4, touching the due administration of clerical estates pending vacancies in the sees; the statute *de asportatis religiosorum* (35 Edw. stat. 1) against the payment of taxes and money from English monasteries to foreign superiors; all which are the outward expression of the repelling of ecclesiastical encroachments and of the beginning of a movement which in the sixteenth century culminated in the Reformation. (6)

The internal reasons for the gradually increasing feud between Church and State lay, however, in the altered vocation of the Church itself. The roots of its power were also

(6) The parliamentary statutes against the encroachments of the ecclesiastical power in this period chiefly concern property and taxation; yet in certain points involve also the ecclesiastical jurisdiction and the province of coercive measures against the laity. They are important from the points of principle, in so far as the King in Parliament definitely claims to exercise the higher right of decision, where the limits between the spiritual and the temporal power are matters of controversy. From this point of view the statutes concerning *præmunire* are the most important. A clear survey of the statutes affecting the clergy is given by Rowland ("Manual of the English Constitution," 1859, pp. 137-156). Stubbs rightly remarks: "Almost all the examples, however, in which the clergy went beyond their recognized rights in regulating the conduct of the laity, come under the head of judicial rather than of legislative action; in that department the common law had its own safeguards. . . . Petitions in Parliament against the encroachments of the spiritual courts are frequent, any direct conflict between the two legislatures is extremely rare. . . . If the class-sympathies (of the bishops) were with the clergy, their great temporal estates and offices gave them many points of interest in common with the laity. . . . England was spared during the greatest part of the Middle Ages any war of theories on the relations of the Church to the State" (Stubbs, iii. 326).

In Parliament itself the prelates never forgot their ecclesiastical interest, yet voted as a rule on questions of public and social policy in a patriotic and moderate spirit.

For the regulation of the jurisdiction of the tribunals the Crown had, moreover, the assistance of the early technical framing of the writs with regard to the rights of the Crown. All suits touching the temporalities of the clergy were subjected to the jurisdiction of the royal courts, and scarcely a trace of opposition to this arrangement can be discovered. Even Glanvill gives certain formulæ of the "prohibition," by which spiritual tribunals were forbidden to entertain suits in which a lay-fee was involved. Particularly a *writ of prohibition* issues against the excommunication of a royal vassal or servant without the sanction of the King. As against the prelates the customary law of seizure of fiefs was also enforceable. For instance, in 1381, Edward I. in the sternest terms forbade the archbishops and bishops to discuss questions in their *Concilia* which concerned the Crown, the person, or the council of the King, or to make any constitution against his Crown and dignity, "if their baronies were dear to them." To the controversial measures for conquering the resistance of the clergy to the taxation belongs a curious military command (Rot. claus. 43 Edw. III., iii. 13, 1369) by which the bishops are ordered to arm all abbots, priors, monks, and other spiritual persons, from the age of sixteen to sixty, to draft them into contingents, and drill them, and are referred to the decree of Parliament touching the national armament against France. This extraordinary document has been copied in Grose ("Military Antiquities," vol. i. pp. 44-46). Three similar writs of the dates of 46 Edward III., 47 Edward III., and 1 Richard II. are to be found in Rymer.

the roots of its decay. Both are contained in the moral and intellectual life of the people. When the battle of the nationalities was forgotten, the oppression of the weaker classes mitigated, villeinage dying out, and the State beginning to display more anxiety to give due legal protection, the Church had been deprived of a portion of its great tasks, which were now more justly cared for in secular legislation and administration. This was true also of the Church as an educational institution. Whilst she had been until the thirteenth century the *alma mater* of all peaceful arts and sciences, from that time a falling off is observable in her intellectual cultivation. The fact was particularly important that in the thirteenth century the jurisprudence of the laymen had emancipated itself from the Church, and begins to make itself the champion of universal struggles for emancipation, which are soon followed by the thronging of the laity to the universities. A political life that was peaceful and orderly, when compared with that of the Continent, had rendered aspiring spirits more susceptible to the arts of peace. The educational institution of the Church had for a time uniformly remodelled the nations, but thus cultivated and elevated they slowly return to their own paths again. To these justifiable national and intellectual aims and aspirations the Church had nothing else to oppose than political power and spiritual coercion. The firmer the canonically elected dignitaries held their baronies, the more did they begin to feel at ease as landed nobles, especially as, on the other hand, the nobles entered the Church in great numbers.

In England, also, it was birth that now decided the appointments to the high offices, whilst merit, education, and capacity were overlooked. The revenue became more and more concentrated in the hands of the prelates, the tithes were largely appropriated by monasteries and foundations, to the prejudice of the preaching and working clergy. The Church, thus constituted, possessed neither the energy nor the will to vie with the rise of learning amongst the laity, but abandoned a part of her province to the lay jurists, whilst she only opposed the higher and more general aims by repulse, spiritual coercion, and the prohibition of independent investigation. The natural consequence was that doubts arose as to the authority of the Church, both in its spiritual, and in its temporal capacity, coinciding with the fearful state of confusion of the Roman *Curia* and the high ecclesiastics on the Continent. But as the heresies attack the very dogmas and the constitution of the Church, and the latter now begins to fight for her existence, she makes use of her immense power, and punishes heresy as ecclesiastical high treason and as a political crime. In Eng-

land this was, of course, more difficult, as the execution of the penal sentence was dependent upon a royal writ. With difficulty the Church obtained a writ from Richard II., which empowered the sheriffs to arrest heretical preachers, but which reserved in the case of laymen a special chancery writ for every arrest. Even against this the Lower House protested with the declaration "that they were not minded to bind themselves or their heirs to the prelates more than their ancestors had done." It was not until Henry IV. that the Church obtained free scope for her penal jurisdiction without a writ *de heretico comburendo*. A period of the burning of heretics now begins, and of the obligation of the officials on oath to exterminate these "conspirators against the King and the estates of the realm." But the religious confusion was for a long time covered by the still greater confusion of the struggles of the nobles in the wars of the Roses. The deeply demoralized condition of those times was partly due to the Church, which, preferring power and the goods of this world before all else, estranged itself from its vocation and the hearts of the people.

It is certainly not easy to determine with certainty how deep the anti-Roman movement had penetrated in this period. The national pride saw itself essentially injured by the papal pretensions at a time when the seventy years' "Babylonian captivity" of the papacy in Avignon had succeeded in making the papal throne the instrument of the hostile policy of the kings of France. As late as 1378, on the death of Gregory XI., in consequence of this condition of things, three-fourths of the cardinals were French. Certain far-seeing and conscientious men of the period, discerned the still more radical demoralization of the whole Church; but their voices assuredly found more echo in the national pride than in the conviction of the untruth of individual Roman Catholic doctrines. The later events of the Reformation, at all events, give no evidence of any deep stirring of the minds of the masses. (7)

(7) During the last century of this period, a small but energetic party of the Commons was evidently untiring in its motions in favour of the new heretical tendency and against the existing institutions of the Roman Church, yet without being able to record any important success. Without exception, these attacks are directed against the position of the prelates, towards the seizure or even the secularization of their temporalities, and often also against the spiritual orders, but not against the parsons in their regular

vocation of instruction and the cure of souls. That the clergy as a profession and in their general functions were not the object of the attacks, and that they still felt themselves as such safe from the laity, is shown by the characteristic phenomenon that the clergy of this period were divided against themselves into just as numerous and violent parties as the nobles and commoners. The secular hated the regular clergy, the cathedral clergy the monks, the Dominicans and Franciscans regarded each other as heretics,



## CHAPTER XXVII.

*The Struggles of the King in Parliament.*

THE exercise of the sovereign rights had now become so closely interwoven with the self-government of the counties, and so artistically combined in Parliament, that, thanks to the wisdom of the legislator, an ideal political constitution appears to have become realized, such as harmoniously blends together all classes of society in the service of the State and expands to the utmost all the resources of the nation, enabling it to fulfil the highest tasks of its legal, educational, and economic development. But it is not given to nations more than to individuals to attain such high aims without hard trials and struggles. As in the preceding period the monarchy appears from generation to generation in an ascendant and descendant motion, so does this epoch display, in the course of six generations, an unexampled picture of a rise and fall which appears peculiar to English history, now that the monarchy had become the head of a powerful assembly of estates of the realm, in which the conflicting interests of society take the form of violent parties. There is a tragic contrast between the beautiful and glorious dawn of this period and the bloody sunset which ends it. Though to the people of that time they were questions of life and death, to us the struggles of this period appear colourless antecedents to the establishment of a system of constitutional law, just as in reality the wildest struggles ended in a firm result and permanent arrangement of classes (Chap. XXVIII.) and a firmly established monarchy (Chap. XXIX.).

**Edward I. (1272-1307).**

The age of Edward I. is the reverse of the immediately preceding one of Henry III. It is the age of the brilliant restoration of confidence in the monarchy; the zenith of the

the Cistercians and monks of Cluny eyed each other with the old jealousy, and to all this must be added the numerous controversies arising from disputed papal elections (Stubbs, iii.

369). In any case, the moral respect in which the clergy were held was most seriously damaged by the burnings of heretics and by the behaviour of the churchmen in the wars of the Roses.

English Middle Ages, the period of the foundation of the systems of legislation and taxation, of judicial procedure and police laws; of a central administration with an active official staff of the counties and municipal unions, of the demarcation of the respective spheres of activity of the council of the realm and the assembly of magnates, of the process of crystallization, which now incorporated an organized representation of the *communitates* into Parliament, as being the "supreme council of the Crown," and finally of the development of the rights of Parliament in their three main channels.

The legislation still continually initiates in the King. The high ideas of this reformer, who found in Bishop Burnet a rare adviser, made him seek of his own accord the advice and the consent of his prelates and barons, and in important matters of the Commons also. These summonses (sometimes of mere assemblies of magnates, sometimes of knights of shires, and sometimes of counties and cities together) are issued on the King's unfettered judgment.

Taxation by Parliament was for the vassals of the Crown an already existing legal institution. The refusal of the clergy on principle to pay taxes, and the resistance of the magnates, induced Edward I. to make full concessions, feeling the impossibility of maintaining a one-sided right of taxation in the old manner against the united opposition of the clergy and people. A magnanimous feeling for the present and future greatness of the nation outweighed all dynastic considerations, and recognized the money grants of the *communitas regni* for the common profit of the realm, "*ut quod omnes tangit ab omnibus approbetur*."

The control of the central administration by Parliament appears under this, as under normal reigns of later times, in the form of petitions, motions, and complaints. According to intention and results, the military powers of the King were exercised for the honour and advantage of the realm, the judicial and police powers for the maintenance of law and peace in the country, the financial powers for the common profit of the realm, and the power over the Church for the maintenance of national independence; and on that account the estates never thought of an immediate interference with the course of government.

In the first half of the reign occurred great acts of legislation and the victorious war in Wales; in the second half the acknowledgment of the constitutional right of the estates to vote taxes and the war with France and Scotland. Financial difficulties are common to both; yet the period is pervaded by an harmonious tone. A popular monarch finds energetic and ready support as often as he demands it. This

monarchical government according to laws, strengthened by the free co-operation of the estates, with its enormous development of military and financial resources, forms a marvellous contrast to the miserable personal rule of Henry III. It left behind it among the people the consciousness that the political government is best centred in a single hand—the hand, namely, of a constitutional monarch, and that it still keeps its regular course where the feeling of his royal vocation lives in the monarch. At the same time this period had fostered that spirit of manly courage which was enabled to help itself in those times in which the monarchy lacked these qualities. It was certainly no easy task under such a monarch to raise the firm and dignified opposition with which the great constable and the great marshal, the Bohuns and the Bigods of this period, at the head of the Crown vassals, raised their voices in contradiction of the King, to enforce the common right of the estates to grant taxes. The episode of Magna Charta so far repeated itself once more, and the next generation showed the necessity for this manly feeling. (1)

#### **Edward II. (1307–1327).**

Immediately after the death of Edward I. a foolish retreat and the cowardly surrender of Scotland indicated that the royal management of the external affairs of the State had again ceased. By the grant of the highest honours in the realm and the squandering of the moneys of the State as well as those of the royal household upon a foreign favourite, Edward II. proclaimed an equal incapacity for internal government. The insulted magnates, with the Parliament on their side, become rebellious, and league together under arms, and under the name of "Ordainers" force upon the king an executive council consisting of two bishops, an earl, a baron, and a representative of the earl of Lancaster. Although the most powerful Earl of the realm stands at the head of the opposition, yet dissension is again the outcome,

(1) As to Edward I.'s Parliaments, consult Parry ("Parliaments," pp. 49–69), Peers' Report (i. pp. 171–254), Stubbs (ii. secs. 179–182). The most important legislative acts have been given in the notes to Chapter XXV. The position of royal legislator is maintained in the style of the statutes. The statute of Acton Burnel (13 Edw. I.) begins with the words, "The King in person and his council have decreed and determined;" the statute Westminster 3, "Our lord the King in his Parliament, at the instance

of the great men of the realm, has ordered;" the statute *Quo Warranto*, "Our lord the King in his Parliament of his special favour and inclination towards his prelates, earls, and barons has granted;" the Statute of Assistance (21 Edw. I.), "Our lord the King in his Parliament hath decreed." On the other hand, Edward defends the statute of Mortmain to the Pope with the explanation that it had been made "with the advice of the magnates," and could not be altered without their consent.

followed, after a few years of mutual persecution, by the fall of the party government. If, however, these events, in which right and wrong are tolerably evenly distributed, are compared with those of the times of Henry III., in which the best and most discerning men like Pembroke and Montfort, are wrecked on the unfinished constitution, yet even in these struggles the progress of the constitutionally organized State is evident. In this crisis the heads of the ruling classes to their own risk and at their own responsibility step into the gap; but the ringleaders pay the penalty for their excesses with their lives and property—a course of affairs which continued down to later centuries, and which has preserved to the aristocracy, together with their honour and their influence, the heavy responsibility of a ruling class. With the support of the commoners the King again succeeded in shaking off the guardianship of the party of the nobles. All decrees of the Ordainers, so far as they violated the prerogatives of the Crown, were repealed, and it was solemnly acknowledged, that upon questions touching affairs of the Crown and State, resolutions could only emanate from the King himself, with the assent of the ecclesiastical and temporal estates.

Yet in spite of this, the weak and purposeless monarch, in consequence of the open rebellion of his criminal consort, was soon obliged to abdicate, and was murdered in prison. The person of the King, but not the kingly authority, had at this time succumbed to a combination, which proclaimed the deed of violence with the insolent words, "The King has forfeited his crown by reason of his incorrigible disposition," whilst the Archbishop of Canterbury announced these words to the people with the intimation that "the voice of the people was the voice of God." (2)

### Edward III. (1327-1377).

In the name of the successor to the throne, a youth of fourteen years, a criminal but energetic faction carried on a regency, which after a few years perished by a bloody retaliation. With Edward III. the first parliamentary government in principle begins, which in thirty-seven of its fifty years'

(2) As to Edward II.'s Parliament, cf. Parry, 70-91; Stubbs, ii. secs. 245-255, as well as the detailed accounts in the Peers' Report. The complete history of the Ordainers (5 Edw. II., *seq.*, Statutes of the Realm, i. pp. 157-167) needs a full exposition in order to enable us to appreciate the practical progress which was made by

the ruling aristocracy since the days when the Mad Parliament at Oxford made the first attempts at ruling the realm by a committee of nobles. But the constitution in the form it then wore was not as yet fitted for enduring a party government of this description for any length of time.

duration convened Parliament seventy times to short sessions, in order to arrange with them the entire affairs of the realm. Even in the first years both Houses began to display lively activity both in external and in internal affairs, under a council of regency appointed by Parliament. The King, after attaining his majority, acted with the assistance of his Parliaments, throughout his long reign, under circumstances frequently difficult, with energy, discernment, and renown. During this half-century all the elements of power advance into the foreground at times, and then yield in their turn to a union of the opposing forces in constitutional struggles. On the one side we still meet with usurpations of the personal rule in matters of imposition of taxes, enforced loans, enforced levying of recruits and ships, extension of forests, arbitrary fines, and beginnings of an administrative jurisdiction by the Lord Chancellor; and then again endless national grievances, confirmations of Magna Charta, and of the right of granting taxes, restrictions of the laws of high treason, and limitations of the exercise of sovereign rights by the legislature. Violent encroachments by the estates on the royal right of appointment; on the other side, express and effectual rejection of them. Protests against a penal jurisdiction of the council in 25 Edward III.; then again express recognition of the same, particularly in the feuds with the Church. There arose at this time a kind of equilibrium of forces, in which Lords and Commons develop their inherent energy.

*Legislation* holds its customary course, with the participation of the Commons; the initiative is gradually shared between them and the monarch.

*Taxation by Parliament* attains a fixed form; petty encroachments upon it are given up by the Crown; at the close of the reign a confirmation is again made.

The *control* of the central administration by Parliament takes a peaceful, though at times an overreaching course. The events of the reign of Edward II. raised the pride of the estates to such a pitch, that even the King, when he had attained his majority, at times yielded. In 15 Edward III., after the failure of a foreign undertaking, the Parliament begins with stormy complaints about the taxation of the clergy, as well as about the appointment of the council and of the highest officers of the realm, which had taken place without their consent, with the claim that a "peer of the realm" could only be condemned to the loss of his rights and his possessions by his compeers. All great officials should at the beginning of Parliament lay down their offices for a short time, to render the lords an account of their behaviour, etc. All these demands are granted in return for a subsidy

of twenty thousand sacks of wool. But after the close of Parliament the King issued a proclamation to the sheriffs, and declares that that statute had been wrung from him in violation of his prerogative and the law of the land, in circumstances under which he could not have done otherwise than "feign," and that in consequence he repealed it after deliberation in his council. Two years later the Parliament also declared the statute repealed. Another attempt by the estates at encroachments (80 Edw. III.) was retracted in the following year. Nevertheless the senile monarch ended his days in disquietude. In 50 Edward III. it was moved, that since the present officials were not fit for their offices, the council should be increased by ten or twelve bishops, lords, and others as permanent members, and important matters only decreed with the consent of all. At the same time appears the first case of an impeachment by the Lower House. The Parliament of the ensuing year, however, let this measure drop.

The result of the century of the three Edwards is the more distinct limitation of the functions and powers both of Church and State, in political government and assembly of the realm, in Parliament and convocation, in legislation and the administration of justice, but more especially in the firm establishment of the rights of Parliament in all their three directions. But with these manifold collisions are linked the increasing prosperity of the realm, as also the development of external power, which in the wars against France gains for the English arms the first rank among the European feudal states. (8)

### **Richard II. (1377-1399).**

A grand epoch of the monarchy is again followed by a period of kingly incapacity. In the name of the ten-year-old King the council of prelates and barons grasps the reins of government. The Commons were encouraged by the parties at the court itself to participate therein to a certain degree, and their action soon makes itself felt. The ruling council consisted of three bishops, two earls, two bannerets, and two knights. Chancellor, treasurer, chamberlain, justices,

(8) Touching the Parliaments of Edward III., *cf.* Parry, pp. 92-137; Stubbs, ii. secs. 256-264. The great material of the precedents has been exhaustively treated in the Peers' Report, and in Hallam's "Middle Ages." The events in 15 Edward III. receive their naïve character from the

severe embarrassments, in which the King had involved himself, not without blame, by his undertakings upon the Continent. It was evidently the twenty thousand sacks of wool which induced the King to make the thoughtlessly pronounced, and irregularly retracted, concession.

and other supreme officials were to be appointed during the minority "in Parliament;" but, as a matter of fact, the government remains in the hands of the great council. On the ground of ever-recurring complaints as to military expenses a motion was now brought forward for the rendering of an account of State disbursements, and this was frequently repeated during the reign. As early as 3 Richard II. a proposal was made to dismiss the regency, and appoint in its stead the first five grand officers in Parliament; but this was not acceded to. The motions of the Commons, which were often of a radical character, are explained by the weakness of a disunited government, and by the encouragement which the ambition of the Earl of Lancaster and other lords of the court lent to such demands.

The King, who at first made great promises, begins his personal rule with unusual grants to favourites (the Earl of Oxford, Michael de la Pole). As early as 10 Richard II. the Parliament begins to threaten. The King, giving way, deposes and fines his chancellor, and grants a commission for the general revision of the administration. In 11 Richard II. it is brought forward as a ground of complaint, that the officials have constantly induced the King to convene assemblies "of certain lords, justices, and others, without the consent and presence of the lords of the great council." The royal chamberlain is arraigned. The promise is given that no letters shall be issued under the signet or privy seal to the prejudice of the realm or disturbance of justice. The royal justices are even condemned to death.

These events were followed by an era, in which the dukes of Gloucester, Lancaster, and York contended for the government in the name of the pleasure-loving, indolent King. But by spasmodic moments of personal energy, by surprise of his antagonists, and through the support of the Commons, a reaction was brought about in which Richard II. apparently regained his full authority. A Parliament surrounded by armed men repealed all the decrees of former years which were aimed at the royal prerogative, granted the King a considerable subsidy for his life, and lent support to every bloody persecution and retaliation, and even to the appointment of a parliamentary committee, which was to remain sitting after the close of Parliament, endowed with decisive functions and exorbitant powers, which were certainly at once abused, and in later times disavowed by the cancelling of all the ordinances, judgments, and measures of the committee. But Richard did not know how to make other use of his regained power than by employing it for malicious retaliation and measures of personal arbitrariness; by a series of proceed-

ings the ill-advised King again revived the semblance of an absolute rule, so that he found himself suddenly forsaken by Parliament, Church, and people, and succumbed to the attack of the Duke of Lancaster, who, landing at Ravenspur with a force of sixty men, after a few weeks stood at the head of the discontented magnates and of an army of sixty thousand men.

The result of this period are encroachments of the Lords upon the appointment to offices, while the Commons gain important precedents for a control of the State disbursements; in both Houses impeachments of the great officers are frequent. The administrative law is pervaded by a double tendency. On the one side is found the endeavour of the estates to limit the discretionary power of the "King in council." On the other, extensions of the official authority in lower departments, especially the extended jurisdiction of the justices of the peace over the labouring classes. On the occasion of the great rebellion of the peasants a summary intervention of the council took place without opposition. To satisfy a real national want, the equitable jurisdiction of the Chancellor at this time became formed. But the most important event of the period with regard to subsequent consequences occurred at its close, namely, direct revolt and formal deposition of the monarch by a resolution of both Houses of Parliament. (4)

### Henry IV. (1399-1413).

The reign of the first sovereign of the house of Lancaster begins with the unsurmountable difficulties arising from an usurped power, surrounded by conspiracies, rebellions, and external perils. As the feud-loving magnates regarded this dynasty as their own creation, their powerful partisans soon vied with the old foes of the house in combating the new King. The records of the council afford us an idea of the sorrows which brought the energetic and courageous monarch to an early grave. A king in this position, surrounded by pretenders with titles equal or superior to his own, was fain

(4) As to the Parliaments of Richard II., see Parry, 138-159; Stubbs, ii. secs. 265-270. On his accession the want of a regency law was felt, in consequence of which deficiency the *Magnum Concilium* itself actually discharged the functions of a council of regency. The consequent dissensions and quarrels are associated with the dangerous rebellion of the labouring classes, a rising which, for want of a ruling power, was dealt with by the wealthy classes after their own fashion,

and, having been provoked by unjust measures, was suppressed with cruelty. The Parliaments regard it in no other point of view than to complain of the mutinous behaviour of the villeins and of their refractory refusal to perform the services due from them. However, in the province of taxation as in that of the discharge of civil and police functions, the discernment and good behaviour of the wealthy classes soon return to the English self-government.



to be content to maintain the *status quo*. There is accordingly no more mention of taxes without Parliament, not even in severe administrative crises. In 6 Henry IV. the subsidies were only granted upon the condition that the moneys should be received by a treasurer sworn in Parliament, and that in the next sittings an account of the expenditure should be rendered. In the same way in 7 Henry IV.; here, however, the King again rejected the demand that the petitions should be answered before the money was voted. In 8 Henry IV., thirty-one weighty articles followed, all of which were acceded to. The King must appoint sixteen counsellors, and allow himself to be exclusively advised by them, and not dismiss them unless they are convicted of an offence. No judicial or financial official may be appointed for life, and no petition presented to the King except in council. Numerous abuses in the council and in the administration of justice were enumerated and prohibited. The Court faction, if it incites the King against his subjects, must be removed and fined. (Four persons of the King's courtiers had before this been removed with assurance "that the like should happen to every other person who should arouse the discontent of his faithful subjects"). For the due maintenance of the laws of the realm, neither the chancellor nor the keeper of the privy seal shall allow anything to pass under the seal in their keeping, either a warrant or a grant of letters patent, a judgment, or any other matter, which should not so pass by law and right, by which regulation the keeper of the privy seal was now also made liable to immediate impeachment by Parliament. In the next Parliament, however, the King sent a message to the Commons to the effect that a statute had been passed in the preceding Parliament which violated his liberty and prerogative, and that he now asked their consent to its repeal. The Commons accede to this, and receive the King's thanks in return. Still more regard had to be paid the Church. One of the reasons of Richard's overthrow was his indulgence towards heresy. Upon the demand of the Church the King accordingly launched the stat. 2 Henry IV. c. 15 against the Lollards, with the assistance only of the great council, and in spite of the opposition of the Commons. The new position of the monarchy was especially favourable to the consolidation of the peerage. A king, whose throne was based only upon the recognition of Parliament, could no longer treat the House of Lords as an assembly convoked by his own plenary and discretionary powers. The inheritable right of those summoned by custom to a summons to Parliament was accordingly acknowledged. The Commons are also favourable to it; in return for which

complaisance the Lords recognize the right of the Commons to vote subsidies, and their co-operation in making statutes, yet with reservation of the exclusive jurisdiction of the Upper House. What could be said against these mutual recognitions? Both Houses acknowledged, in consideration of them, that Henry was the rightful King of England. The supreme jurisdiction of the House of Lords was now expressly sanctioned, the mere official elements receded into the position of deliberative members. The procedure in both Houses now adopted a form resembling that of the present day. But the whole issue resulted most decidedly in favour of the Lords, whose military ascendancy was felt to be a consequence of the great French wars. (5)

### Henry V. (1413-1422).

The popular and glorious reign of Henry V. in like manner moves within the limits of parliamentary privileges. The great struggles in France give the political activity an overwhelming impulse towards foreign affairs, under which legislation and business in Parliament for some time rests. The somewhat needy state of the financial resources of the Government demand frequent money grants. In 10 Henry V. the Commons are convened to take part in negotiations touching the league with the Emperor Sigismund and the treaty of Troyes, after a great council has declared itself incompetent to deal with these subjects. In harmony with the Church, and with the liveliest sympathies of the nation, the dynasty especially consolidates itself by the brilliant successes of the war in France. (6)

(5) As to Henry IV.'s Parliaments, see Parry, 159-170; Stubbs, iii. p. 1-72. At the outset the difficulty is felt of altering an hereditary succession to the throne by deliberative assemblies periodically convened. The Parliament of Richard II. had, as a *Consilium Regis* of Richard, ceased at his deposition. Richard's Parliament could not therefore legally become the Parliament of Henry. Hence the several members of the former Parliament were all assembled, but only as a "convention," and after a few days new writs of summons were issued to the same persons to form a Parliament in the name of King Henry IV. But by such fictions the jurists could be more easily quieted than the Percys and the great martial noble families, who, in league with the Scots and the Welsh, worked just as zealously for the over-

throw of the dynasty as they had before done for its elevation. In the struggle for self-preservation, Henry IV. rode rough-shod over single constitutional forms, as on the occasion of the summary execution of the Earl of Nottingham and of the Archbishop of York, when they had been taken with weapons in their hands. But, with regard to both Houses and to the interests of the nation, the Government conducted itself with such parliamentary correctness, that among the manifold encroachments of the Houses upon the royal privileges, there was yet found no occasion for an impeachment of ministers.

(6) As to the Parliaments of Henry V., see the comparatively sparse matter in Parry, 170-175; Stubbs, iii. 72-91. There occur again under this reign acts of a personal penal jurisdiction,

**Henry VI. (1422-1461).**

Under this name a regency again begins its sway, this time over the person of a child of nine months, who, owing to an unfortunate deficiency of intellect, was destined to remain all his life incapable of forming a single resolution. Contrary to the testamentary dispositions of Henry V., the Duke of Bedford was appointed not *regent*, but *protector* and *guardian*, with the Duke of Gloucester as his substitute. The affairs in France, which had become critical, were conducted by Bedford until his death (1484), with a firm and experienced hand. The internal government of the country was managed with a certain degree of security and regularity by an extraordinary council of the King appointed by the Lords. The situation of the realm had meanwhile become critical; financial embarrassment had become urgent; but the affairs of the State were for a long time worthily conducted by ruling nobles. The numerous regulations of the council, dating from this period, testify to the regular course of State business, which was so ordered that a certain and responsible official was appointed for each principal department. The insufficiency of the rule by the nobles without monarchical guidance, however, became gradually apparent in the bitter enmity between the Duke of Gloucester and Cardinal Beaufort and his powerful adherents. The hostile party found in Margaret of Anjou not merely the queen of its choice, but also a party-leader uniting manly spirit with feminine craftiness. The murder of the Duke of Gloucester (1447) gained for the Court faction thus leagued together the sway over the country in the King's name, but at the same time brought upon it the bitter hostility of the Duke of York and his partisans. The merited unpopularity of the Government led in its turn to the impeachment and murder of the Duke of Suffolk (1450).

In the party passions, which had been now kindled on both sides, the first schemes of the house of York for a succession to the throne were displayed, to which this branch of the royal family stood certainly nearer, after the death of Richard II., than the younger line of Lancaster. From the death of the Duke of Gloucester (1447) all had gone badly in the State; Henry the Fifth's conquests were lost; and though

where such was allowed to be reserved according to feudal principles, and other individual acts of personal rule (Nicolas, ii. pp. 29, 30). Several lords were condemned without judgment of their peers by judge and jury, on account of a conspiracy against the life

of the King. A summary penal jurisdiction of the council and the chancellor *ex delegations* of the council was expressly recognized by 2 Henry V. stat. 1, c. 9, in cases of murder and manslaughter.

the constitution was safe, the administration at every step failed in its duty; the Crown was impoverished, the Exchequer empty, the peace of the country never well maintained, the law never well administered; life and liberty of the subjects were insecure, whole districts in constant dread of robberies and tumult, and the local government either weakened by factions or in the hands of some great lords or a clique of courtiers (Stubbs, iii. 270). As early as 1454 the mental disorder of the King led to a first protectorate of the Duke of York, which again came to an end at the monarch's apparent restoration to health. The major part of the nobility held firmly in old feudal allegiance to the house of Lancaster. The opposing party consisted of the Duke of York, the greatest landowner in the realm, in league with the great family of the Nevils and the city of London, and apparently commanding the sympathies of the majority of the municipalities. The difficulties and financial distress of the Government had meanwhile accumulated. The murder of the Duke of Gloucester, at the instigation of Margaret, gave the signal for the future action of the dynastic parties, who in consequence of the wide ramification of the royal family by marriage with the great nobles, represented two great opponents almost equal in power. With difficulty were the parties kept within bounds for a few years by the constitution and the outward reverence paid to the Crown. So soon as this barrier was removed by the hopeless imbecility of the monarch, a furious conflict breaks out, in which both parties contend not against, but for the possession of royal power—a struggle in which acts of self-preservation, of violence and revenge soon become almost inseparably entangled. (7)

(7) As to the Parliaments of Henry VI., see Parry, pp. 175-189; Stubbs, iii. pp. 94-181. The first decades still give, in the face of the accumulating difficulties, a testimony of the capacity of the nobility for rule. It was not until the second half of the reign that the political organization slowly collapsed. As early as 23 Henry VI., Suffolk, in anticipation of coming events, refused to conduct the marriage negotiations with France. On this matter there was passed in advance a kind of indemnity bill, confirmed by both Houses and the King, but which did not afford any protection against the subsequent impeachment of the minister. The unrestrained struggle that was now brewing resulted from a degeneration of that military organization which was the outcome of the great wars upon French soil. The royal

paid soldiery flocking homeward in thousands upon thousands were only too readily absorbed by a newly organized military system of the great wealthy nobles, which became formed after the beginning of the French wars under the name of "the liveries," and in which the warlike passions of the Middle Ages now burst forth in England. Under "livery" was originally meant the furnishing of officials and servants of a great householder, prelate, monastery, or college with clothing and means of subsistence. The clothing now took the character of a uniform and badge of service; and the greatest possible number of servants and dependants was looked upon as a proof of a high and aristocratic position. The livery was accordingly given to all who were willing to wear it, as the sign of a great following and of an

The battle of St. Albans (1455) opens the thirty years' war of the Roses. After a short period of apparent peace, the King became, in 1460, a prisoner in the hands of his opponent, who with great moderation brought about a decision of the Upper House, which recognized the Duke of York as Protector, and after Henry VI.'s death as his successor on the throne. But the Duke, surprised by a stratagem of the Queen, was overcome, and the victorious party gave the signal for the execution of the captured opponents according to martial law, and for unceasing massacres and violence, which in the very next year brought about the overthrow of the hated Government. The powers of the King's council and the whole movable part of the political constitution became disunited in this great struggle; in which, in fact, there was no question of a struggle for constitutional principles. Only so far as the house of Lancaster had gained the throne by its alliance with the clergy and Parliament, did the traditions of the Church and of the high nobility stand more upon this side, and those of the Commons more upon the other. Moreover, no ecclesiastical legal authority could inform the people upon which side the right to the crown lay. In truth, each fought for his share in the political power, and for retaliation and revenge. Through Parliament no independent solution now appeared possible. Each one was subservient to the victorious party by which it was summoned, and condemned the other. Upon

influential position. The liveries became therefore badges of union. The lords wore one another's badges out of courtesy. But before all the liveries became the counter signs of the great court parties, and the emblems under which the battles of the great dynastic factions were waged (Stubbs, iii. 531, 534). With this was connected the frequent fortification of the residences and castles of the magnates, which though really dependent upon royal licence, after the times of the barons' wars had been permitted in numerous instances, especially under Edward III. It was precisely the contrast between the strictly ordered life of the English county and the adventurous camp life which had lasted so many years in France, which awoke afresh in the chivalrous part of the great nobility and the knighthood the daring and martial spirit of the Middle Ages, and the pride and insolence of the knighthood towards the peaceful classes, and made this epoch a brilliant era in heraldry and in family pride. These retinues of the nobles concurred in a most remarkable manner

with the stream of veterans returning from the French wars with their successful experiences in field tactics, supplemented with the use of heavy artillery, before which the old glory of the bowmen had begun to pale. The issue of the struggles, with such a mixture of warlike elements, was dependent upon surprise and accident to such an extent, that the battles of the following period mostly ended in massacres, and were decided in a few hours. In connection with this condition of things now begins the series of laws relating to liveries and maintenance, and first of all in 31 Henry VI. c. 2, the recognition of an extraordinary penal jurisdiction of the council in cases of "great riots, extortions, oppressions, and grievous offences," especially in the case of violent acts of the magnates; disobedience to the council is to be punished as contempt of the King, in the case of a peer with loss of his goods, his offices, and of his seat in Parliament. This regulation was only to be in force seven years, but it became a precedent for the later Star Chamber.

the temporal side the prime cause of the confusion lay in the military organization of the retinues of the great lords, the "liveries," now forming the uniformed corps of extemporized leaders, increased tenfold by the enlistments of soldiers of the armies returning from France, and these made the issue of the battles altogether incalculable. The county militia formed no sufficient counterpoise, so long as it was opposed to the masses of the more skilled warriors who were perpetually streaming back from France. Upon the ecclesiastical side the mischief lay in the indifference of the Church, in which personal religion had become lost, whilst the higher clergy, without any guiding principle, recognized every political power which recognized their worldly possessions. As among the confusion of the barons' war at the close of the preceding period, the higher clergy made themselves conspicuous in the persons of a few distinguished individuals, so did a change in the intellectual and moral education of the epoch announce itself in the fact that this period of wild struggles appears as an "era of great jurists," in which lord chancellors and justices of the realm make themselves famous in a time of violent barbarity, without however being able to secure the course of justice from serious abuses. (7\*)

#### Edward IV. (1461-1483).

The victory of the White Rose over Margaret of Anjou brought the heir of the house of York upon the throne. The bloody conflict of annihilation waged by the high nobles among themselves and particularly the indifference of the Church and of the masses to the aristocratic parties, made Edward after a short interval lord of the land, in a time of deep demoralization, in which the existing contrasts of the English Middle Ages came to a violent issue. The long French wars, in spite

(7\*) The first protectorate in 82 Henry VI. was made constitutionally revocable *durante bene placito regis*. The second protectorate was appointed for an indefinite period, until the duke should be relieved of it by the lords in Parliament. The members of the council became more fluctuating. Even in the previous year fifteen members had been dismissed, and, on the other hand, five adopted into it from the party of the duke. The claim of the house of York to the succession was already expressly proclaimed. With the consent of the nation and of Parliament, the house of Lancaster, for a period of sixty years had sat upon the throne of England, with the support of the Parliaments.

It had long and gloriously fulfilled the duties of the monarchy, and entered with two generations of Englishmen into the bond of mutual faith, protection, and allegiance. Could a claim of the older line be now entertained? But the King was notoriously incapable of governing, and in his name the persecuting spirit of Margaret had, after her victory of 1460, begun a system of executions, confiscations, and actions for treason, which left the house of York, its party and partisans, according to the law of self-preservation, nothing but a recourse to arms, and to the nation scarcely any other choice than that of siding with one or the other party.

of all their brilliancy and glory, had proved a hopeless undertaking. The European position of England demanded a final settlement with the Continent, which at last resulted in favour of the French nation, and once and for all decided the national isolation of England and its position in the European family. In the course of some decades of war upon French soil, a race had grown up which no longer found room in the peaceful counties and towns of its native home. Grown turbulent through the effects of camp life and of a course of plunder and extravagance, the lords now returning home found it even harder to settle down in their native country than did the thousands of hirelings. In the sober local government, in the English military, judicial, and police administration there was no longer a field for military ardour and plunder. Now that these elements were thrown back in large numbers upon England, the struggle of the rival noble factions found in the soldiery accustomed to their leadership only too ready a material, out of which every rich and popular leader could frame for himself armies for civil war. Owing to the contested title to the Crown a party standard was found for all factions. The wild aristocratic struggle owed its peculiar character precisely to the alliance of all the great noble families with the wide-spreading royal house, and to the centralization of all political power in the King in council and the King in Parliament. The politic head of the Yorkists, representing the interests of the boroughs and the country's need of rest, gained the victory at the expense of the great families of the land. Supported by the Commons, Edward IV. declared the rule of the kings of the house of Lancaster to be usurpation, the Lancasters, Somersets, Exeters, Northumberlands, Devonshires, Wiltshires, and in all one hundred and fifty-one nobles, knights, and clerics guilty of high treason; not by judgment of a court of law, but for the sake of shortening the proceedings, by "bill of attainder." One-fifth of the land fell by outlawry and confiscation into the hands of the King, who restored a personal rule with pitiless severity. But in marvellous contrast to the former period, there is seen, amidst all the confusion, the coherence of the firm elements of the present political system. Amidst the din of arms, courts of justice, itinerant justices and juries went on in their usual course, and the jurisdiction of the Chancellor was enforced against fraud, deceit, violence, and disturbance of possession by decrees of *probatio in perpetuam rei memoriam* and *habeas corpus*, and this whilst the nobles fought in the King's council with intrigues, and in open field with drawn swords. (8)

(8) As to the Parliaments of Edward 188-190; and iii. c. 18, "Lancaster and IV., see Parry, 189-194; Stubbs, iii. York"). The entire barrenness of all

## Edward IV., Richard III. (1483-1485).

The royal power of Edward IV., so cruelly gained and so mercilessly exercised, fell after the murder of his sons to the usurper Richard III., who in vain endeavoured to expiate by popular concessions his heavy crimes against all the laws of God and rights of man. After the organized military power of the higher nobility had collapsed, the chief importance for a short time centred in the House of Commons, which, however, with the exception of a bill against "benevolences," showed activity only in the matter of penal prosecutions and private bills. Forsaken by the greater part of his adherents, Richard III. succumbed to a coalition of the remains of the two factions of nobles, and lost, by violence and treachery, to the new house of the Tudors, the throne which he had hardly gained. (9)

the contemporary histories extends also to the parliamentary proceedings, which are mere registers of private bills and petitions of trade. It is the first Government under which no single statute was passed for the protection of personal liberty and for the redress of national grievances, although in this reign the administrative abuse of the so-called "benevolences" begins for the purpose of defeating the right of granting taxes. It is a reign of terror by reason of the ruthless exercise of the extraordinary judicial and police powers, which kept the proscribed adverse party under constant surveillance, though the descendants of the party leaders who were condemned to death and confiscation were for the most part restored by parliamentary decrees to their right of succession. The condition of the realm under Edward IV. was actually one of war, although in name it was under a government acknowledged by Parliament. Thus can be explained the employment of courts-martial under the King, especially the much-talked-of patents of 1462 and 1467, by which a provost-general was appointed, "*ad cognoscendum et procedendum in omnibus et singulis causis et negotiis de et super crimine læsæ majestatis cæterisque causis, quibuscunque per præfatum comitem ut constabularium Angliæ, seu coram eo, motis, movendis seu penditis et*," which Lord Coke considers contrary to the constitution (Inst., vi. 127), and from which proceeded the controversy respecting the admissibility of courts-martial in times of peace. The

occasional precedents for execution without trial of captive opponents which occur under Henry IV. and V. are followed in the wars of the Roses by frightful consequences. Occasional instances, too, of the use of torture in criminal proceedings are met with in this reign of terror, but cannot be regarded as the regular procedure of the courts.

(9) As to the Parliament of Richard III., see Parry, 194; Stubbs, iii. 226, 233, 234. What is outwardly incredible in the criminal career of the tyrant is psychologically explainable as being the incarnation of a deeply demoralized time, in which, together with the extinction of all principles of law, all moral restraint became loosened by the decay of a Church which even responded to the flatteries of Richard III. The repeated attempts to clear the character of Richard III. have all failed. The dramatic masterpieces of Shakespeare, dictated as they were by tradition and knowledge of the English character, may be regarded as an historical sketch of this period. At the close of the wars of the two Roses, men had to tell of twelve pitched battles, and of eighty princes of the blood royal who lost their lives in the battle, by the hand of the executioner, or by murder. Moreover, authentic history is enough to show that in this tragic period blood-guiltiness and retaliation follow one another with marvellous constancy. In the main the picture given by Stubbs (ii. 306) may be regarded as a mirror of the whole period. "It is a



The monarchic power emerged from this hideous struggle with a title that could not be practically disputed, and with an undiminished supremacy. But when the blood shed in the struggle of the rival noble factions had ceased to flow, the Lower House had attained that full equality of power with the weakened Upper House, with which this period closes. /

## CHAPTER XXVIII.

### The Three Estates of the Realm.

USURPATIONS and dynastic struggles veil the process of the legal formation of the estates, which was being brought about during this period in a quiet and unbroken course, according to the sound principle of the Middle Ages, that of basing the privileged position of the higher classes upon their performances in the personal service of the State, and upon the amount of their contributions to the revenue. The merit of having successfully established this legal order belongs again to the monarchy. The words of Edward I. in the struggles for the consolidation of his island-realm were not forgotten, when he demanded of his faithful *communitates* that they should meet common perils with united resources, and take counsel with the King when the military and financial forces of the Government required to be increased "*ut quod omnes tangit ab omnibus approbetur*." The truly royal idea which influenced Edward I. and Edward III. is the combination of all antagonistic elements of society in a free activity in the service of the State, and the association of the people in the great tasks of the State, internally and externally, including every class of society capable of co-operating in the work.

It is now the prelates and the temporal magnates who, by reason of their performances in the service of the State, represent a ruling nobility,—the middle classes (knights, freeholders, boroughs), who, according to the ideas of rank in those times, form a regular third estate—the three now legally

period of private and political faction, of foreign wars, of treason laws and judicial murders, of social rebellion, of religious division. . . . The barons were no longer feudal potentates, with class interests and exclusive privileges . . .

but leaders and allies of the Commons, or followers of the Court. . . . The royal policy had placed the several branches of the divided house at the head of the great territorial parties."

recognized *status civiles* of the English parliamentary constitution—on whose account this period is described as the period of the “estates of the realm.” As, however, lords spiritual and temporal are bound together by essentially uniform rights, and on the other hand the knighthood is distinguished by certain privileges from the rest of the commoners, in this chapter we distinguish :—

I. The estate of the spiritual and temporal peers ;

II. The estate of the landed knights ;

III. The estate of the freeholders and burgesses ; to which may be added, IV., the whole of the rest of the community as *infra classem*.

I. The estate of the spiritual and temporal magnates has now, as a result of the position they had actually attained under Henry III., come to be a legally recognized estate of the realm, by the formation of the *Magnum Consilium*, which conceded to them a personal share in the conduct of all important business, and with it the highest political privilege of the time. For the spiritual lords a seat and vote in the great council is connected with definite high spiritual offices. In the case of the temporal lords the right is, as a rule, inheritable by the firstborn son, or even by some other heir, according to the wording of the patent granting the peerage. To the old rights of the English feudal tenure this political right was only added as a fresh privilege by personal grant from the King on the formation of the *Magnum Consilium*. In consequence, the justices in 7 Henry VI. assumed that the claim to the name and title of a peer (as a right of property) belonged to the jurisdiction of the common law courts, whilst the claim to a seat in Parliament must be determined by the “King and the peers,” the latter as a new creation of the *jus publicum* (Nicolas, Privy Council, iii. p. 58).

The *spiritual peers*, now generally consisting of two archbishops, nineteen bishops, twenty-seven abbots, priors, and masters of orders, have, according to old usage, precedence of the temporal peers, the archbishops of the dukes, the bishops of the earls. Their right to a seat and vote in the great council is perfectly equal to that of the temporal lords. Their legal privilege of being judged by the Upper House has not arrived at any regular development, because, not without reason, they considered the claim to the privilege and benefit of clergy as more valuable. Moreover, their social position has remained on an equality with the pretensions of the temporal lords, which have now risen high. The archbishops keep up their establishments upon the same scale as the dukes, the bishops live like the earls. They hold their court

with as numerous a staff of officials, servants, and followers, and travel like the temporal nobles with an armed retinue and great train. Though their interest in the army is less, yet on the other side they have a proportionately firmer position in the leadership of the Church, and in their personal experience in conducting the higher administrative business. (1)

The temporal bench of peers consists at the close of the period of the five degrees of dukes, marquises, earls, viscounts, and barons, numbering under Henry VI. about forty or fifty in all. They have at the close of the period attained the hereditary rank for which they have long striven, in the legal form of a royal grant by patent, which at the same time defines the order of descent. Side by side with the peers by patent, there still appear certain *barons by writ*, though in continually diminishing numbers, for whom the hereditary summons is dependent upon custom. Besides these, there still continues a small number of personal summonses, particularly for bannerets of the army then existing, which in the course of this period come *de facto* to an end. The most illustrious families in the land form at the close of the Middle Ages an estate of nobles, yet one restricted to the most modest degree of birth-nobility, only passing to the eldest son, or the other legally entitled heir, without giving any right to pretensions to an ennoblement of blood, nay, under the express acknowledgment that all members of the family (except the wives and widows) belong to the class of *commoners*, and have no share in the privileged right of appearing before the peers' court, or in the other privileges of the nobility. (1<sup>a</sup>)

Meanwhile, the numbers of the temporal peerage, as was the case in the former period, underwent the most frequent and considerable fluctuations. The great families of the Norman period had partly died out or been dispossessed, and had partly become connected by marriage and inheritance with the possessions of the royal family. After Edward I., the tendency was evidently to grant the greatest dignities and possessions of the earldoms, and *à fortiori* the recently created

(1) In extent, the baronies and knights' fees of the prelates were at this time certainly rather less than that of the lords temporal. Many bishops and abbots possessed by knights' tenure not nearly as much as belonged properly to a barony, according to the Exchequer scale, but only single knights' fees according to the old valuation. The number of their under-vassals now appeared to be remarkably diminished, as the spiritual lords had in course of time to a great extent evaded the actual furnishing of

feudal troops, or had obtained express exemption. The Bishop of Lincoln, who under Henry II. was required to furnish sixty horse, was reduced by Edward I. to five; the Bishop of Bath from twenty to two, and so forth.

(1<sup>a</sup>) With reference to the slow and gradual origin of the hereditary peerage, and the numerous controversies respecting it, I may refer to the excursus to Chapter xxiv. See also Stubbs, i. 176. The courtesy title of the sons of peers is not legally recognized.

dignity of a duke, only to members, or at all events to near kinsmen of the royal house. Henry IV. sought to strengthen the usurped throne by the creation of a great family entailed estate, the legal results of which, to some extent, still remain. With this view the Duchy of Lancaster was formed, by union of the counties of Leicester, Lancaster, Lincoln, and Derby, that is, by union of the numerous demesnes situate therein, and of all those manorial and judicial jurisdictions, which were to secure the ducal house an influence in wider spheres. The "palatinate" jurisdiction of the duchy included, accordingly, a number of baronies in the most various counties. In effect, this accumulation of the possessions and family connections of the great families of the land had only one result, that it involved the whole of these elements of influence in the fall of the royal house. The great baronies of Buckingham, Norfolk, and Warwick, were almost equal to the royal possessions. For the purposes of the defence of the country, the greatest number of great lordships was to be found in Yorkshire and the Welsh marches; the greatest number of small baronies in the southern counties. Whilst in the midland counties great baronies were less rich in lands, on the other hand the influence of the Crown had, in consequence of the manorial and judicial power of the duchy of Lancaster, become predominant. With the progressive development of agriculture the revenues of the great landed estates increased to an extraordinary degree. As early as the fourteenth century great landowners are mentioned upon whose estates were counted 24,000 sheep, 500 horses, and several thousand head of cattle. But with increased wealth enormous expenditure had also grown up, of which the Black Book of Edward III. affords us a graphic picture, computing the expenses of the royal household at £13,000 annually, of that of a duke at £4000, of a marquis at £3000, of an earl at £2000, of a viscount at £1000, of a baron at £500, of a banneret at £200, of a knight at £100, and of an esquire at £50. The expense connected with rank in aristocratic display at these times was shown in a great retinue of armed knights, chaplains, clerks, motley soldiers and servants in uniform, a display which was considered obligatory, according to the notions of rank in those days. The Court Calendar (the "Black Book"), claims for an esquire 16 servants, for a knight, 16; a banneret, 24; a baron, 26; a viscount, 84 (20 esquires, 40 yeomen, 24 grooms); an earl, 180; a duke, 280 (6 knights, 60 esquires, 100 yeomen, 40 grooms, 24 stablemen). The retinue of the King himself was estimated only at about twice the number of the followers of a duke.

These manners of the times coincide in a singular manner with the military organization in the French wars, which has been discussed above. Under Edward III. a condottiere-system had begun, by which the warlike lords furnish, lead, and even train whole divisions for the great war. The flower of these divisions is formed of private court-officials, sub-vassals, retinues, tenants, and servants, who are joined by warlike freeholders from the county militia, trained to martial exercises under officers of the knighthood. But the customary and military exercises give the barons a still greater ascendancy, for they find on their own estates the means to equip larger corps, and to drill them in the customary manner. Their dependants form the *cadres* of legions, which can easily be mobilized. It was certainly only the King who possessed the financial resources requisite for keeping together these masses for any length of time, by giving high pay. But the lords were at the same time in a position, by forming coalitions, to collect armies, whose sudden attacks the King under unfavourable circumstances was unable to withstand. Even after the close of the first period of the French wars, this danger showed itself under the unstable rule of Richard II., and, after many vicissitudes, led to the deposition of the King. Under his successor, we meet with feuds undertaken by the nobles, in which some few discontented barons, within a few weeks, advance against the King with armies of from six to eight thousand men (*e.g.* in 1405). The martial characters of Henry IV. and Henry V., knew how to curb this refractory spirit, and to divert its activity to the soil of France.

This military organization, combined with the tolerated fortification of numerous castles and manorial mansions, turned out quite as disastrous for the dynasty, as for the nobles and the country, in the outbreak of the furious war of the Roses. The two great dynastic factions, with their retinues of armed followers and hired troops, spread the party-spirit among the knighthood, the counties, the towns, and the parties in the Lower House, and finally split up the whole country into two camps of almost equal strength. Like an anachronism, the chivalry of the Middle Ages once again revived with all the mischief of private feuds, and all the ceremonial of a pedantic heraldry. The armed retinues in uniform (liveries), became at once the nucleus of a faction and a *clientèle*, which, with its powerful party machinations, interfered with the administration of justice and the maintenance of the peace, and after the era of the wars of the Roses moved the English legislature to proceed with laws, frequently renewed and rendered more rigorous, against

"liveries, maintenance, and champerty." (1<sup>b</sup>) This revival of the chivalrous feuds of the Middle Ages in no way harmonized with the legal organization of the military system, especially that of the county militia, nor with the strict discipline of the courts and the police, the position of the justices of assize, and the commissions of justices of the peace. But it was just this contradiction between the inclinations of the higher classes and the rules of law, which placed the high-handed fashions of the time in harsher and more overbearing opposition to the common law of the land. The adoption of the French language, manners, and customs, by the upper classes of these times is similarly connected with the French wars; but all this was nevertheless powerless in the face of the firmly established foundations of the English constitution, and the position of the third estate, and therefore it was that in the thirty years' wars of the Roses it hurried the baronial sway to its certain downfall.

II. The estate of the knights, or rather of the landed gentry, which proceeded from the blending of the lesser Crown vassals with the sub-vassals and great freeholders, has now won a prominent political position through the right of electing and being elected to the Lower House, in which latter it is a step in advance of the municipal burgesses. Its title to this position is based, as in the case of the peerage, upon personal service for the State, and upon the amount of taxes paid.

According to the gradually increasing uniformity in the imposition of the land and income taxes, the English gentry (very different from that of the Continent) was a chief basis of direct taxation, of which the knights' estates, certainly more than six thousand in number, according to the scale of the *feuda militum*, formed a principal factor. Although the knights' estates (regard being had to their *relevia* and other feudal dues) were taxed, as a rule, as compared with the

(1<sup>b</sup>) For the origin of the liveries the necessary data have been already given. The earlier statutes under the house of Lancaster had reserved to the King the right of granting liveries and badges of unions, as well as to allow the lords, the universities, the Lord Mayor of London and others, to put their servants in uniform. The lords especially had been allowed to distribute uniforms, hats, and emblems to armed soldiers, as well as to fortify their castles in great numbers: thus had the way for the catastrophe of the war of the Roses been unconsciously prepared. The protection of the great magnates was,

in consequence of the badges of service, extended to an excessive number of quarrelsome followers, whom they themselves were unable any longer to control, and whose deeds of violence led to the oppression of the population around them, and who also when prosecuted by the criminal and civil courts, prevented the course of justice by the union of powerful bodies and the protection of the great lords (maintenance and champerty), and exposed the defenceless people to a powerful party-tyranny. A survey of this form of faction, and the legislation affecting it, is given in Stubbs, iii. secs. 470-475.

boroughs, in a proportion of one-fifteenth to one-tenth, yet they remained, in this as in the following period, the principal contributors to the direct taxes of the country. (2)

Still more prominent and secure did the position of the knighthood appear, owing to their personal performances, in the now fully developed system of self-government. The military organization had, by a qualification of £15, arranged the knighthood as the first class in the county militia, and thus given it a prospective claim to the officers' places. In the constitution of the counties, the knights had ever formed the nucleus of the suitors; and in the formation of the *magna assisa*, and in the later extension of the jury system, they invariably remained at the head of the list of jurors. But the new institution of justices of the peace places the knights still more completely in an ubiquitous position at the head of the local government, to represent which, the knights, in their position as officers of the county militia, as jurors, and as police magistrates, had such a natural claim, that for generations we find the same names as representatives of their respective counties.

The executive had evidently a high interest in these services. But the State, as such, had no interest in restricting to certain families the claims arising therefrom, and in excluding all other classes from acquiring such rights. The English monarchy was strong enough and resolute enough to defend the true interests of the State in the formation of the estates of the realm, and thus to give the English aristocracy that sharply defined contrast which it presents to the formation of the inferior nobility in Germany and France, by following out the three lines of legislation laid down in the preceding period.

1. By the *alienability and divisibility of the knights' fees*, which had been already in Norman times permitted by royal licence, had been recognized again in Magna Charta, and was

(2) The statistical authority for the feudal tenure of this period is the feudal book frequently cited under the name *Testa de Nevill*. It appears to have been compiled at the end of the reign of Edward II., or the beginning of that of Edward III., yet employing materials which according to official proofs date from the time of Henry III. and Edward I. It contains six thousand three hundred registered names of great and lesser Crown and sub-vassals. The latter, however, have been incompletely given; for where the immediate vassal makes his payments direct to the Exchequer, the sub-vassals are included in the summary statements. It is worth remarking

that the great groups of estates, both in number and total size, when compared with Domesday Book, appear to have increased, whilst Crown vassals of a medium estate of from three to ten knights' fees are now seldom met with. In the above-named sum total are reckoned also the numerous "serjeanties," as well as the fiefs under wardships, and the ecclesiastical fees, which were under royal management. From this confused material, which is only intended for the Exchequer accounts, a graphic picture can at once be gathered of the splitting up of the fees into fractions, and of the intricate confusion of the greater landed estates.

more clearly defined in the statute *Quia Emptores*, 18 Edward I. c. 1. For alienations of Crown fiefs the sanction of the King was still reserved, but the neglect to obtain it only entailed a moderate fine (1 Edw. III. c. 12). Herein the policy was evidently pursued of facilitating the division of great landed estates, multiplying the number of the Crown vassals and freeholders, and of entirely prohibiting for the future the creation of new manors, with their courts baron and police. A class-contrast between "noble" and "*roturier*" tenants of knights' fees after German fashion could never arise in England. But what was thus withheld from the ambition of the knightly families to keep themselves apart, as the propertied county nobility, redounded to the good of the knighthood as a whole, by according an enhanced political influence to the entire landed class.

2. The second legislative tendency was to *keep the honour of knighthood open to all liberi homines* who had possessions sufficient to enable them to learn and perform the heavy service of horsemen. In the interests of the national defence and the finances, a practice was begun by the Exchequer under Henry III., in 1254, of officially demanding of all greater landed proprietors, under threat of penalties, that they should cause themselves to be made knights. The frequently changing practice demanded this of all possessors of freeholds, varying according to a scale of £10, £15, £20, £30, and £40 annual value, which last sum was finally fixed under Queen Elizabeth, in consequence of the altered value of money. These coercive measures had no particular effect, as the majority of landowners preferred paying the fine for neglecting to acquire the honour of knighthood; perhaps in order to escape the manifold burdens of the jury service and other duties. At all events, whilst a general obligation of the great landed proprietors was adhered to, the idea of an exclusive right in certain families to the dignity of a knight could not here arise. Pursuing the same tendency, the monarchy never permitted a limitation of the prebendal stalls in the cathedral and collegiate foundations to a narrow circle of privileged families, nor the assertion of proofs of nobility and other creations of so-called "autonomy," such as were built up in Germany on the impotence of the executive.

3. These were the reasons why the class of landowning gentry in England did not become a *hereditary order*; nevertheless, class privileges were accorded to them which harmonized with their actual services in connection with local government and the payment of taxes—an exclusive qualification for knights of the shire. The political right resulting therefrom, which in course of time was destined to become



the most important of all privileges, was now, however, based upon the newer form of the county constitution, independent of the older rank in the feudal militia. The deputies were still called knights of the shire, but the new dignity of a county member was regarded as independent of the honour of knighthood. In quite early times we meet with numerous esquires among the deputies, who were, after the election, symbolically girded with the sword in the county court, in order to satisfy the letter of the law; at the close of the Middle Ages the majority were only esquires. It was in the nature of the case, that those landowners who preferred, as justices of the peace, to devote themselves to agricultural pursuits and local interests, were just the men who, caring little for court duties, military adventures, and the honour of knighthood, should be chosen as deputies. The legal recognition of this well-acquired right was contained in 23 Henry VI. c. 15 (1444), to the effect that only notable knights and such notable esquires and gentlemen of the county were to be elected, as could become knights, but no yeomen and inferior persons.

Thus was a privilege conceded, as modest as that of the peerage, and not recognizing a greater amount of privilege of nobility than arose from the duties which the actual property rendered or could render, with certain still more modest honours extending only to the sons of the landowner, and no further. What was thus withheld from the aspirations of the individual families was again made good by the enhanced political influence of the whole class. The political position of the knighthood was recognized, without prejudice to family rights and social position. The county gentleman was quite as proud of his old family and coat of arms as the great baron, whose possessions often commenced centuries later than his. The esquire bore on his coat of arms a helmet and a shield, and had a very lively consciousness of a higher warlike vocation, even before he gained knighthood and the golden spurs. His younger sons generally received their education in the house of a nobleman, and he very frequently allied himself by marriage with the families of the higher nobility. But more valuable than these knightly honours stood the squire's influence in the district, in which his position was undisputed: in the offices and dignities of sheriff and justice of the peace; in county court and great jury, and also as representative of his county in the House of Commons.

An anomalous epoch, the way for which was prepared by the French wars, was ushered in under Henry VI. With French kinships and fashions, with French language and manner of life, new chivalrous manners spread from the

higher nobility to the knighthood. The great dynastic spirit of faction seized upon the counties. The outbreak of the war of the Roses recalled the period of club law under Stephen. Although the legal duel had been virtually abolished by the action of the legislature, yet the chivalrous notions connected with it did not die out. The Court of Chivalry had at that time attained a certain importance. The brilliant successes, the immense booty, the adventurous life of the armies in France appears to have once more introduced into an otherwise prosaic period all the romance of chivalry. Daily intercourse with the French nobility and their social views, and a camp life of many years' duration far away from home, naturally increased to a great extent both class pride and military *esprit de corps*. (2\*)

In spite of this transitory variation, the mainstay of the knight's position in the provincial district remained, unaltered and undisturbed, based on his activity in the life of the country. For this reason the knights appear, from the first, to have had a regulating influence in the House of Commons. Though under Edward I. Norman names predominate among knights of the shire, yet by degrees English names become more constant. The same family names recur more and more regularly in Parliament, as well as in the parties of the court

(2\*) The leanings of the English knighthood in this period have been described by me in an article upon the "gentry" in Ersch and Gruber's "Real-Encyclopædie." Under the influence of the great wars subsequent to Edward I., and especially under Edward III., certain movements in this direction were already working. Tournaments which were hateful to the prevailing public opinion, and which had been at times strictly prohibited, came again into honour under Richard II.; the use of escutcheons as family emblems had become an established custom in the French wars, and was under Henry VI. regarded as an hereditary right. Under Richard II., for instance, a patent occurs in which John de Kingston is designated as "*receveur en l'estate de gentilhomme et lui fait esquier*." Under Henry VI. a certain Bernhard Angevin was raised with a formal "*nobilitamus*" to the inferior nobility. It was now a time in which the herald's office played a part with its rules of tournaments, shields, escutcheons, pedigrees, and in which pretensions to gentlemanly condition or degree were directly raised. In 29 Edward III. John Coupland was by

patent appointed an hereditary banneret. Under Edward III. and Henry IV. the orders of the Bath and the Garter were founded. The ceremony of creating a knight was revived with great solemnity. The dignity of the banneret was for a time regarded definitely as a degree of nobility, and therefore it was that under the protectorate of the nobles in Richard II. the election of a banneret to be a knight of the shire was declared to be inadmissible. Occasionally also in the statutes of this time the characteristic of the *generosus a natiuitate* was mentioned. Further than this, the legislation of Parliament never proceeded. The duties which the laws of the realm had already imposed upon the great landed proprietors in military, judicial, police, and tax-paying departments were all too serious and too burdensome to admit of attaching the idea of a nobility of birth to the mere descent from former owners of knights' fees. That tendency is only a transitory one, as was the system of paid soldiery. It is only permanent institutions which decide the question of class-distinctions.

and the great council; and towards the end of the period the growing respect for the Lower House is manifested by the entrance into it of younger sons of the higher nobility. In the year 1549 Sir Francis Russell, son of the Earl of Bedford, was the first instance of an heir to a peerage taking a seat in the Commons. The knights of the shire are permanently the leading members of Parliament—an honourable and brave element which stamped its character upon the proceedings of the Lower House. The representation of the constitutional rights and liberties of the nation until the close of the Middle Ages was undertaken purely by the knighthood in the Lower House, where, as a matter of course, the Speaker was also chosen from among the knights of the shire. (2<sup>b</sup>)

The so-called "educated classes" in England, as in Germany, come next after the knighthood. In a class system which bases its graduations upon landed property (or rather upon the services of real estate), all intellectual labour, as such, is still *extra classem*. Yet it, too, takes an important share in the functions of self-government, and thereby also a share in the privileges of the knighthood.

Especially is this true of the *parochial clergy*. Whilst the prelates with their *tenure by barony* belonged to the noble estate of the realm, the higher parochial clergy shared the rank of the knighthood, and in convocation had their own parliamentary representation. By the appointment of parochial clergy upon commissions of the peace, they also participated in the political influence of that magisterial office. Next in order came the universities with their ecclesiastical institutions, their ecclesiastical staff, and their ecclesiastical privileges. For the whole body of the clergy, the benefit of clergy in cases of a criminal nature was a weighty privilege, which frequently led to immunity from punishment, and which at this time, by a declaration of the episcopal com-

(2<sup>b</sup>) Only a seeming exception is the election of Richard Brook, member for London, to the Speakership (1454) by reason of the peculiar situation of London, and the permanent connection subsisting between the county of Middlesex and the city. Remarkable at first sight, in the violent party struggles of the magnates, is the apparently passive yielding spirit of the Lower House, and still more, as Stubbs (ii. 550) points out, the fact that the members of the servile Parliaments have sprung from the same class and frequently from the same families as those of the independent Parliaments. But

in the dynastic struggles, especially in the wars of the Roses, right and wrong were for the lay understanding difficult to distinguish; even for a juristic mind the institution of a lineal succession to the throne, dating from many generations back, was something not very easy of comprehension. According to the situation of affairs then, there was nothing at last left even for the knighthood but to side with one party, choosing it according to their respective views of personal gratitude and loyalty, and to considerations of power and temporal interests.

missary, "*legit ut clericus*," could be extended to every person who knew how to write.

Even in the preceding period a juristic class had become separated, as a specially learned profession, from the clergy. The *serviens ad legem*, *doctor juris*, and the educated lawyer partook, like the lower clergy, of the honorary rank of the esquire, and found in the commissions of peace for the county a frequent occupation, independent of any real estate; the legal profession became more and more regularly the school for the higher judicial offices. At the close of the period the judicial staff consisted of a paid body of officers learned in the law. The clerical and liberal professions formed the complement of a higher middle class, which was in later times fitted for becoming fused with the knighthood into a single united body of gentry. (2°)

III. The class of freeholders and municipal burgesses formed, together with the knighthood, the now legally recognized third estate of the realm, defined by the active right of election to the Lower House, and founded like the other estates upon payment of taxes and personal service for the commonwealth.

The property base for freeholders entitled to the suffrage was real estate not liable to feudal services, in other words *free* (that is, only liable to money payments or definite services). Their original stock (the *liberi homines* and *sochemanni* of Domesday Book) had been already increased in the preceding period by the parcelling of knights' fees; and in this period it is multiplied in consequence of the extravagant pomp of the nobility and the knighthood, which was sure to lead to manifold alienations of portions of their estates, and to mortgages. The share in the land and income-tax of these small landed proprietors in the country and in the provincial towns was no inconsiderable one. But still more prominent was their personal service. The Statute of Winchester classified the *liberi homines* down to the lowest degrees for the service of arms. The uniformed liveries of the great noble households were formed of the members of their families. Of them were formed the heavy-armed horsemen, archers, and

(2°) The parochial clergy bears at this time, like the knighthood, the honorary title "sir;" upon the justices of the realm was conferred the honour of knighthood, and even that of a banneret by royal grant. By an ordinance of 1 Henry V., according to which in every formal citation of the courts for the future the "estate or degree or mysterie" of the defendant was to be expressed, the additions esquire and gentleman from that time forth attained a technically acknowledged signifi-

cation, especially for the legal profession, and the notables of the cities. Stubbs justly remarks on this point, "Two of the most exclusive and 'professional' of modern professions were not in the Middle Ages professions at all. Every man was to some extent a soldier, and every man was to some extent a lawyer . . . and he could keep his own accounts, draw up his own briefs, and make his own will, with the aid of a scrivener or chaplain" (Stubbs, iii. 596).

hobblers for the royal armies in France, which had so gloriously vanquished the ill-disciplined feudal levies of the French army, that a treatment of this class in England as being *talliables* and *corvéables* was forbidden, if on no other ground, by their military profession. But the regularly recurring suit of court, which now with the gradual dissolution of the county, hundred, and manorial courts, became more completely developed into service on juries, could not but decide the question of a legal assessment. From the first, in the civil assizes not merely knights but all *libere tenentes* had to be taken into account. The presentment jury and the petty jury in criminal cases, as part of the magisterial institution for police purposes, had from the first been constituted with a prospective view to a numerous employment of the smaller freeholders. The service on a jury was accordingly from the beginning built upon a broader basis than that of the old legal suitors, who were, indeed, nominally, still summoned to the "county court." With Henry IV. begin new ordinances as to the mode of carrying out the county elections, in which at last the legal maxim that "political duties shall determine political rights," prevails. By the ordinances of Edward III. the duty of serving on a jury in the county court was fixed at forty shillings annual value on a freehold, whether in fee or for life. These freeholders formed with the knights the ordinary court of the county in its then form. With this qualification, which was tolerably high for those times, the third estate in the county separated itself off from all below it. (8)

(3) The qualification of forty shillings is considerable when compared with the assessment of £20, which still continued as the rate of a knight's fee, in so far as it signified half a hide of land, a small yeoman's estate, or corresponding house property, with reference to which Fortescue mentions with satisfaction that in England a great number of such owners were to be found. If we remember the considerable number of jurors who were required each year for the civil assizes, the grand juries of the itinerant justices and justices of the peace, the petty juries of the same courts, the sheriff's tourn and the courts leet, there will be seen to be an annual participation of thousands, by which knights, freeholders, and burgesses remain in a state of active independent co-operation. In 1 Richard III. c. 4 it was certainly provided that in the sheriff's tourn, in addition to freeholders of twenty shillings, *villani* also of 26s. 8d. should be required to do suit, a pro-

vision which is once again incidentally mentioned in 19 Henry VIII. c. 13. But the extraordinary service in the police courts in the country had never been regarded as an ordinary suit of court, and was the less suitable as the limitation of a pecuniary qualification, since in the private leets the copyholders were only required to do suit in cases of emergency, and then without uniformity or any legally recognizable principle. The somewhat undefined conditions of the old duty to ordinary suit of court, in the county court, and of the old service in police courts, as well as those of the newly instituted system of serving on juries, made themselves particularly felt in the undecided dispute as to who had to contribute to the daily allowance of the knights of the shire. Neither the legislature nor the central courts were able to establish here any general principle. Except in the county of Kent this liability to contribute remained dependent upon local custom.

A similar basis was originally also given to the municipal suffrage, apportioned according to participation in "lot and scot." The municipal privileges arising from the farming of royal dues (*firma burgi*), the regular grant of a separate police court (court leet), and still more extensive municipal jurisdiction led to the establishment of the principle that "all resident householders paying scot and bearing lot could exercise the liberties of citizens." Thus only day-labourers, lodgers, guests, and strangers were excluded. By the conversion of the indefinite dues payable to the lord paramount into fixed money contributions, the municipal tenure had been placed as *burgage tenure* upon an equality with the rural free tenure, *socage tenure*. Whether householders, by reason of the mere relation of tenancy, paid scot and bore lot and were admitted to the rights of citizenship, varied probably according to custom. The titles to the municipal citizenship by birth, trade, marriage, etc., which were so multifariously discussed in later times, were originally only the normal modes of founding a household. But the form of the civic service of court, and the civic taxes, the varied landed interests of the agricultural burgesses, trade and commerce, combine to give to the municipal suffrage an unequal development with a slow yet continuous downward tendency. The contrast to the normal creation of the estates manifested itself in the English cities in the following phenomena.

1. In the decay of the discharge of suit of court in person, as a consequence of the altered judicial constitution and the gradual decline of the old police courts. From the very nature of the police business, it could be more efficiently performed by justices of the peace and constables than by periodical assemblies of citizens. The new service as juror, in which the passing of sentence was no longer involved, appeared more than ever a pre-eminently personal burden, and was considered desirable by no one. Poor laws were not as yet a part of the administrative system of the community. The periodical meetings of the citizens (courts leet) thus lost their practically important business, and only retained any degree of importance under special local conditions. For the service on juries the stat. 21 Edward I. allowed "custom" to decide, without fixing any qualification for the municipal juries. But poorer persons as well as various wealthier tradesmen and the civic notables soon sought to avoid the service. For current administrative matters there were formed almost everywhere administrative committees, who were either constituted out of the "leet juries," or were, as occasion required, newly formed from among the number of chosen councillors. But such committees as are employed

upon single lines of business, particularly the assessment of taxes, have notoriously a tendency to become permanent and finally to fill up their number by co-optation, as no one usually presses for participation in them.

2. The original character of the municipal assemblies and money grants became also altered. For the deliberation in Parliament as to subsidies proposed to be voted, the municipal deputies were at first only regarded as a representative committee of the *communitas*, which received binding instructions from its constituents; and originally perhaps in municipal assemblies a serious deliberation may have taken place as to the amount which it was proposed to vote. However, an understanding had always finally to be arrived at among those summoned to Parliament, by which the determination of these money grants became centred in the body of the representatives. But the more the recurring money grants adopted a uniform character, and particularly after the rates of contribution for the individual localities had become fixed, the more did such deliberations on taxation lose their object. The urgency of the taxes demanded by the King had finally to be left to the consideration of the deputies in Parliament. The commission of the delegates thus gradually and imperceptibly merges into a general mandate of confidence. In like manner in the apportionment of the subsidies and tenths that were voted within the district of the individual town, the scale was a fixed one, in which the principal labour fell upon the assessment commission. It is evident how thus the municipal meetings from the point of view of taxation lost their definite object. The contributions to be raised for the municipal needs of the borough were as yet too unimportant to make municipal meetings or the election of the representatives a necessity.

3. To this must be added the varieties of the municipal modes of property, when compared with the more uniform interests of the country. Trade and commerce have a natural tendency to form themselves into guilds, and, when the guild has been established, to exclude all outsiders from pursuing the craft. Owing to the impotence of the executive (in Germany) or to *laissez aller* (in England), groups of interests arise from this which aim at the exercise of police power and, when they have gained it, at constituting to themselves an autonomous industrial or commercial law according to their class interests. This process of formation now began its work in England, yet it varied in different places according to various influences. Where the institution of guilds had attained a paramount influence, the heads of the guilds might be the select class of the active citizens. In small localities

the agricultural citizens and the owners of houses formed themselves into a kind of peerage, in analogy to the villages, in which the municipal landowners (burgage tenants) appear as the governing body. Where, besides the municipal mayor, no permanent council or committee existed, a gathering of all taxpayers or landowners, or even of all residents, for the performance of single acts of election was sometimes called. But in proportion as personal activity in the community decreases, different modes of property assert themselves. No statutory and no customary law can under such circumstances keep political right alive; and least of all a mere right of suffrage. At this time no abuses are as yet thought of. It was not until the following period that a conscious endeavour showed itself to fix these actual conditions by incorporation, and to replace the local unions by a counterfeited notion of "corporate" unions. But how small the actual electoral body was, is shown by the fact that even from the time of Edward III. the beginnings of a system of bribery are met with. (3\*) The legislature allows these conditions to continue in their diversity, and even aggravates them—

(3\*) The political economic diversities, from the point of view of social economy of the landed, industrial, and commercial interests of the English towns towards the close of the Middle Ages have been treated by Stubbs, iii. pp. 359-392 ("Municipal History"). The English industrial and commercial policy of this period has been very thoroughly treated in German treatises, particularly (with a full use of records) by Georg Scharz ("Engl. Handels Politik gegen Ende des Mittelalters," Leipzig, 1881), and in practical conciseness by W. von Oschenski ("England's Wirtschaftliche Entwicklung im Ausgang des Mittelalters," Jena, 1879). For the village institutions I refer my readers to the important contribution of Naase ("Die Mittelalterliche Feldgemeinschaft," Bonn, 1869). The economic interests were here so different, that in its municipal development, England most nearly corresponds to the social development of Germany, in so far as the executive, generally maintaining a passive attitude, allows the social groups to form their own constitution autonomously. The Cinque Ports retained an exceptional position between the knight-hood and citizenship, on account of their special duty to defend the country. The great trading and commercial towns allow the trading companies and commercial

guilds a definite share in the municipal government, which also extends to numerous inland towns. Trade and internal commerce show no very strong inclination for corporate exclusiveness, but certainly for the export trade, which a few towns had originally, by reason of the dues imposed upon export, contrived to secure to themselves by the so-called "staple privileges." The articles of export thus monopolized were wool, sheep skins, leather, lead and tin, which only the merchants of the staple, as a corporation with exclusive jurisdiction, were allowed to export. The staple places were London, Bristol, Canterbury, Chichester, Exeter, Lincoln, Newcastle-on-Tyne, Norwich, York, and Caermarthen. Such privileges have not formed the municipal constitution; but they have in some places aided in breaking through the normal municipal constitution by a kind of guild system. The periodical mistakes of this economic policy are seen in the decay and impoverishment of the small inland towns by the monopoly of the staple places, which is also manifest in the tax-register as well as in a certain indefiniteness of the legislation concerning these staple articles. All these elements are seen accumulated in London on the largest scale. In general, there prevails, it is true, at the



4. By an aimless increase in the number of parliamentary boroughs. Their modest position appears to have kept alive the opinion that in them there was to be found a parliamentary element devoted to the royal power. In spite of the resistance of the towns themselves, the number of members was at the close of the Middle Ages increased to four times the number of the knights of the shire, whilst the corresponding ratio of performances in the service of the State was rather the reverse. This undue ascendancy is now seen in the social tendencies of the legislature. As early as Edward I. the citizens of London petition that the foreign merchants be driven out of the city "because they become rich to the impoverishment of the citizens." The influence of the boroughs compels Edward III. to restore the staple privileges which had been abolished. Special laws are to protect the "honest merchants against increase of prices." The admission and toleration of foreign handcraftsmen meets with repeated opposition. The exportation and importation of wares is to be effected by ships which belong to the King's subjects (Rich. II.). Only persons of an income of twenty shillings may allow their children to learn municipal trade or commerce (7 Hen. IV. c. 17). Still more important is the system of police regulations affecting labour. The plague in the year 1384, and the consequent increase in wages, at first caused an ordinance to be issued and two years later the frequently mentioned parliamentary statute, which fixed the wages at the scale of the last five or six years, under threats of imprisonment and branding. Under Richard II. new statutes are passed, which prohibit a number of amusements to the lower classes, and are intended to keep them closer to their homes. The insurrection of the peasants under Richard II. leads to the misapplication of the penal laws touching high

time of the origin of the estates, a good understanding between the great landed interests of the country and city, in which from the earliest times the most powerful part of the nobility for a certain portion of each year resided in person. But just in this place a fluctuating struggle is seen in the creation of social class-right. The industrial property lies here so thickly accumulated that the uniform wealthy corporation aimed at overcoming its neighbour—that is, the guild system endeavoured to suppress the municipal system. After an unsuccessful attempt under Henry III. (1362), the municipal suffrage was granted to the guilds by ordinance under Edward III. The municipal elections now actually

passed from the burgesses to the trading companies. The innovation was, however, so opposed to the bases of the municipal and county constitution, that shortly afterwards an ordinance, 7 Richard II., restored the old order of things and reinstated the wardmote in its old rights. But the battle between the guilds and the municipal government continued without interruption from that time forth; the guilds retain a continual influence upon the elections, and gain also from time to time new royal concessions, as under Edward IV. A list of the older charters of London is to be found in Merewether (iii. pp. 2360–65). Cf. Gneist, "Die City von London," 1868.

treason. Under Henry VI. the union of labourers for the purpose of evading the statutes of labourers is declared felony. The Lower House once even petitions that the lower classes be prohibited from sending their children to school and devoting them to the clerical profession—and that too “for the honour of all free men in the kingdom.” In the sumptuary laws the prevailing idea is that of “keeping the money in the country.” It was only owing to the higher power and clear-sightedness of the monarchy, the magnates, and the knights, that these attempts were defeated, and their encroachment in general neutralized.

In the varied aspect of these phenomena it is clear that the firm cohesion which unites the knights and freeholders into one single *communitas* in respect of service and taxation, and knits them together with the estate of the nobility, is wanting in the municipal elements. The civic members only represented a part of the boroughs, which were originally selected at random, and distributed very unequally among the counties. The greater number of them represented no more than a market and trading centre for the surrounding country. The really active element among the citizens was very unevenly distributed in the several towns, and displayed a constant tendency to still further diminution. The natural result was, that in the municipal representation only a taste and understanding for local and class interests could develop, and no higher political taste for the “*ardua negotia regni*.” (8<sup>b</sup>)

In the inner life of the cities there is certainly seen much stirring agitation, sometimes even a violent struggle, not indeed between “capital and labour,” but between trade and commerce, between trade and trade, guild and guild, magistrates and guilds, or magistrates and citizens. Into the dynastic party struggles of the times and into the feuds waged between political factions in respect of the relation of the royal council to Parliament, they were drawn only through

(8<sup>b</sup>) In harmony with my views, Stubbs remarks: “The presence of the borough members is only traceable by the measures of local interest . . . local acts for improvement of the towns . . . diminution of imposts in consideration of the repair of walls, and the redress of minor grievances.” The merchants “thought it more profitable . . . to negotiate in private . . . with the King, than to support his claims for increased grants of money in Parliament; out of Parliament they were his pliant instruments; in Parliament they were silent or acquiescent in the complaints of the knights.”

“There is scarcely the vestige of an attempt to reform the borough representation” (Stubbs, iii. 589). At the head of the political movements in the Lower House are to be found only the knights. The boroughs merely give notice of local disorders. The great commerce stands as a rule on the side of the royal authority. Sometimes certainly among the knighthood the interest of the landowner is paramount regarding the rights of the workman or day labourer, but on the whole a continuity of their policy is seen in constitutional traditions (Stubbs, ii. 514).

the party leanings of the nobility and the knights. But down to the close of the Middle Ages scarcely a single instance can be discovered, where, in the political party struggles, an independent proposal has proceeded from the burgesses. In the struggle also between the dynastic parties they were canvassed by both sides, but yet play no important part in the struggle, and do not display a constant devotion either to the Red or to the White Rose.

Thus was all precedent and all principle wanting for the laying down of the passive qualifications of eligibility for the office of municipal representative in Parliament. The writs addressed to the sheriffs are worded as before, as indefinitely as possible—an election to be made "*de discretioribus et magis sufficientibus*;" and thus it remained. But who should these eminent representatives be? The actual state of the judicial, magisterial and fiscal relations rendered the inactive mass of the citizens, as a rule, indifferent to an isolated electoral act; as a matter of fact the electoral body was, in the majority of the boroughs, a small and select one. The choice fell, naturally, upon notables and civic gentlemen of the commissions of the peace. But as the commission of peace of the county was regularly connected with the cities, through the medium of the current police administration, the "gentry" came also into permanent connection with the boroughs, which in the fifteenth century often made them the objects of their choice. In any case, those appointed to the commissions of the peace and as deputies, represented analogous elements of property, to whom the gentry could not refuse an equality of standing with themselves. Towards the close of the period we find consequently the titles of the gentry, such as esquires, etc., conceded also to certain municipal notables.

But the more important political business was discharged by the staff of justices of the peace and by the deputies in Parliament, by which means an impulse to work for the public good and a permanent political influence were thus given only to the higher classes. In the case of the higher ranks of the borough population, the foundation was thus laid for their later fusion with the class of knights, forming a united gentry. In another direction, by the lowering of the inferior civic classes to the level of inaction, the foundation of the pre-eminently aristocratic character of the later parliamentary representation was laid. For the landowning classes of the county, as a whole, the fabric of the three-estate-system, based as it was upon independent activity and rateability, was so immovably and firmly established, that it was capable of embracing and supporting the motley and anomalous forms

of municipal representation, and thus in marvellous continuity outlasted the storms of the Reformation and the Revolution down to the nineteenth century.

IV. ~~What~~ What remains *infra classem* after the three estates had been separated off, is in the main a working population, which enjoys indeed personal liberty, but without any share in the political rights of the parliamentary constitution. These classes of society also pay their dues; but in the great majority of cases not to the State, but to a landlord, a master, or householder, who is the immediate bearer of the State burdens. Some of these classes could, as supplementaries, discharge the suit of court in the court leet; but this form of magisterial courts was only a local, incidental, varying and now decaying institution.

The improvement in the position of these classes, which had now taken place on the whole, is pre-eminently due to changes in rural economy. The money system with its liberating effects had now passed from political to local, and from public to private economy. Landowners and monasterial corporations at this period farmed no longer by means of bailiffs; a new system, that of rent, had come into being, and a new class of leaseholders had been formed, occupying a middle position between the freeholder and the agricultural labourer. After their numbers and their prosperity had both increased, they share, with the small freeholder, the name of "yeomen." Such leaseholders in the fifteenth century, in ever-increasing numbers, took the place of the local bailiffs who formerly managed the lands of the lords and the monasteries, but they stood in another form of dependence upon the landlord than did their predecessors. In respect of taxation, they were rated *in bonis* almost in the same way as the freeholders *in terris* (Stubbs, iii. 552, 553). Their position, moreover, is dependent upon the amount of the rental and the capital. But with the leasehold system the interest of the landlord disappears in the services of his villeins, whose emancipation in consideration of money payments had been extensively brought about.

Epidemics, bad harvests, and mistakes in the policy of taxation had, under Richard II. and Henry VI., caused repeated insurrections of the peasants, which were apparently attributable to the attempts of the landlords to re-introduce villeinage and manorial services, after new relations of service and rent had already taken their place. But when the system of money payments had become once for all established, by means of the institutions of rent and wages, the reasons for dissatisfaction were quietly removed, both by the landowners themselves, and by the abandonment of the unsuccessful system of poll-tax.

This new system of economy shows its favourable results first of all in the abolition of serfdom. Whereas it was formerly more the influence of the Church, it was now the economic interest of the lord himself, which favoured the emancipation of the remaining bondsmen, for a free labourer proved a more capable man. Jurisprudence also accorded to the bondsmen the personal protection that belonged to the *liberi homines*, by regarding their relations to their lord as a legally defined exception. The serfs who still exist at the close of the Middle Ages are quite unimportant anomalies. (4)

Quite as much ameliorated was the legal position of the manorial peasants or *villani*. The undefined services attached to these villeins' estates became, in process of time, for the most part converted into money rents, for reasons which lay in the economic interest of leasehold (Scriven on Copyhold, i. 46, 428). In the case of a higher class of them, at the commencement of this period, a right was in practice accorded to their land, to the extent, that deprivation might only take place according to the custom of the court (the later so-called privileged villeinage). For the rest, likewise, a right of deprivation only *ex justa causa* was recognized towards the close of the period by a famous decision, Taltarum's case, under Edward IV. "Copyhold" became, in this later period, more and more the common term, a name derived from the court roll, which was the title of possession. (4<sup>a</sup>)

The labouring classes of the cities were also in economic

(4) In the insurrection of the peasants under Richard II., the social ideas of the labouring classes went hand in hand with the heretical efforts against the Church. From the standpoint of human rights, the emancipation of the bondsmen was placed in the foreground. The act of emancipation, which was passed at that time, was certainly repealed at the instance of Parliament; the interest of the lords themselves was, however, apparently sufficient to remove this grievance, which in later times was never revived. In the rebellion of John Cade (1450) the agitation was neither on account of serfs nor of reformation ideas, but it was only the classes, who laboured for hire, who demanded the "seven halfpenny loaves for a penny," abolition of money, equality in dress, etc., *égalité et fraternité*, the natural antipodes of an exaggerated system of regulations affecting labour, which again disappears with the excesses of these regulations under the houses of York and Tudor.

(4<sup>a</sup>) The copyhold was once estimated

by Lord Coke in a decision at one-third of the whole real property in the country, an estimate which, according to later statistics, was perhaps twice its real extent. Of a separate nature were the tenures in ancient demesne. These comprised partly full freeholders, partly hereditary *villani* (analogous to the privileged villeinage), partly mere copyholders, who were by royal favour exempted from the ordinary courts and the county government, freed from jury service, and therefore, also unrepresented in the county and in Parliament, not bound by parliamentary money grants, and only subject to their special *tallagie*. Representatives of them were often summoned to Parliament, but they never met together with the Commons and formed no part of the Parliament. In the case of these peasants the taxing right of the Crown continued longest. In the later voting of the taxes the King consents on his side for those peasants unrepresented in Parliament in the words "*Le roi aussi le veut.*"

dependence upon property, but only in the free relation of the contract of hire. The narrow-minded restriction imposed upon their liberty of movement by the poor-law regulations was not introduced until later centuries. They share their passive position in the municipal government with the majority of the wealthy classes themselves in the later form of the municipal suffrage.

What the parliamentary constitution was able to concede to the unrepresented members of society (who in every form of representative government form the majority), was the legal liberty of mounting up into the higher classes, in which respect this constitution, in comparison with the parliamentary constitutions of the Continent, is a model one. As it is open to the labourer in town and country by industry and skill to rise to be a tenant and small proprietor, so also is the way open to the working classes to enter into a more profitable career by their freedom of movement from place to place, and by the freedom of entrance into local companies and guilds; to the middle classes in the towns is open the entrance into the offices of the municipal government; whilst the notables of the towns can obtain admission into the commissions of the peace or parliamentary representations, even with the honorary rank of esquire. The retail trader can at any time become a freeholder, and the leaseholder, in addition to his leasehold, can also exercise political rights as a freeholder. The wholesale trader can acquire from the impoverished noble the ancestral estate with all the rights and privileges of a manor attached; and his family in the second generation will be reckoned among the most zealous champions of the privileges of the knighthood. Conversely the entrance of the younger sons of the nobility and the knighthood into the counting house of the merchant was not considered derogatory to their rank. The names of knights of the shire are found on the registers of the trading companies and guilds, and members of the old nobility solicited with especial eagerness the offices of the civic mayors, aldermen, and recorders, as well as the municipal seats in Parliament. Elevation into the higher estates by means of the Church is open to all classes; the middle classes may attain high honours and dignities through the law Inns of Court, and for the highest merits in that profession, even admission to the ranks of the peerage. (4<sup>b</sup>)

(4<sup>b</sup>) "The younger sons of the country knight sought wife, occupation, and estate in the towns. The leading men in the towns, such as the De la Poles, formed an urban aristocracy

that had not to wait more than one generation for ample recognition. The practice of knighthood . . . the custom of wearing coat-armour, as well as real relationship and affinity, united the

The firm bond which knits together the system of this social formation by means of self-government and payment of taxes with the highest functions of the executive, extends down to the lowest classes as a bond of social aims, which placed, indeed, actual impediments in the way of ability and merit, but never legal barriers. English society thus attained a fundamental basis for the development of individual ability and energy, which determine the course of its history during the following generations.

superior classes; the small freeholder and the small tradesman met on analogous terms" (Stubbs, ii. 188).

What an alleviating influence the early organized direct system of taxation naturally exercised upon the class interests is shown by the tax assessments themselves. The sumptuary laws (23 Edw. IV.), the equality of the property and family law, and equality of taxation, produce here groups of society such as were unheard of on the Continent. The property tax of 1859 shows, for example, the following groups:—Dukes (188 shillings), justices of the Crown (100 shillings), earls and the mayor of London (80 shillings), barons, bannerets, Crown counsel and great advo-

cates, aldermen of London, mayors of the large towns (40 shillings), knights, lawyers, councillors of the second order (20 shillings), knights of orders and merchants (18½ shillings), esquires, lower lawyers, mayors and councillors of small towns, greater freeholders and greater tenants (6½ shillings), lower monks, esquires, and gentlemen without landed property, smaller merchants, tradesmen and tenants (3½ shillings), and so on. That in the offices of the royal court the three great classes of serjeants, gentlemen, and yeomen were distinguished, and that the social classes were regarded otherwise in the herald's office, was, at the close of the Middle Ages, just as natural as in our time.

## CHAPTER XXIX.

**The Organization of the State—The Royal Prerogative.**

LIKE the permanent division of society into classes, there was also completed in this period an organization of the executive, which, though obscured by dynastic struggles, became accomplished in a quiet continuous development.

Marvellous to relate, yet vouched for by contemporary writers, the itinerant justices and jurors went their regular circuits all through the aristocratic Wars of the Roses. In fact, by the legislation of this period, those permanent institutions were founded, which towered above the struggles of the time like a pillar;—large independent local unions, and great judicial corporations, encircle every government redoubtably, even in the conflict for the crown itself. But the position also of the permanent council, which from its central place exercises in daily action the varying functions of the executive, had become changed by the regular commands and prohibitions addressed to functionaries or to subjects being permanently regulated; and that, too, in a double manner, either (1) by ordinances, issued without the consent of Parliament, and which are alterable at the will of the King alone; or (2) by statutes, which were issued with the consent of Parliament, and were binding also upon the King, and could not be altered without the consent of the three estates in Parliament.

The powers of the monarchy (state) still continue in the form of administrative regulations and ordinances, uncurtailed, nay, materially extended by new demands made upon the subjects; but the exercise of them is, in harmony with the nature of the State, with wise moderation confined by the Crown by unalterable rules. The King accordingly no longer appears as the personally commanding ruler, the feudal, military, judicial, and magisterial lord; but the Crown appears as a permanent institution, which guarantees legal protection and permanent support to the life of society, and thus takes firmer root in the heart of the people. With this self-restriction by law, there accrues also to the King him-



self a firmer legal protection, and to his rights an enhanced inviolability and sanctity.

This specialization of the administrative law, which forms the transition to the modern political system, appears in the fourteenth and fifteenth centuries to have advanced in all departments of the political government, although in different degrees, according to the temporary needs of the executive power.

*The military power* over the Crown vassals continues according to deeds of enfeoffment and custom (common law); but the system of the national militia had become more comprehensive and more living; the recruiting and employment of which was now fixed by parliamentary statutes. But the deficient principles of the recruiting leave room for various abuses of the military power for financial and political purposes.

*The judicial power* is based partly upon Norman administrative practice, but in its most important features upon statutes, which more exactly define the position of judge and jury. The weak point is the reserved *jurisdictio extraordinaria*, which still follows the lax principles of the old administrative system, often restricted, it is true, by Parliament, yet just as frequently extended by party leanings.

*The magisterial power* is based partly upon common law; but, in its principal departments, upon an endless series of statutes affecting the public safety, trade, and labour; all which in some measure limit the arbitrary powers of the local magistrates. The weak place here is the extraordinary powers residing in the royal council.

*The financial power* is based upon the demesne-possessiones, the feudal dues and other hereditary revenues of the monarchy, whose extension was effectually prevented by statutes. These form the "ordinary revenue," out of which the current expenses of the State are to be defrayed, supplemented by extraordinary and periodically granted land and income taxes, to the grant of which the estates begin to attach conditions.

*The ecclesiastical power* of the King had been much restricted after the events of Magna Charta; in the dualism of the ecclesiastical and temporal state it was only the external boundary-quarrels that were settled by statutes. Encroachments of the Church upon individuals were stopped by "writs of prohibition," encroachments upon the State by penal prosecutions under the new statutes.

The organs for the exercise of the rights of the political sovereignty thus organized have been already described, but shall be again recapitulated in this place in their three principal limbs.

1. *The Central Courts* connected with the county and local courts form the *jurisdictio ordinaria*, the permanent part of the judicial system. There still continues a personal dependence of the justices of the realm, who remain at the same time assistant *justitiiarii* of the council, and whose appointments are as a rule subject to revocation; the spirit of monarchical government, however, makes this deficiency less sensibly felt. As early as by the stat. 2 Edward III. c. 8, the justices were ordered to allow justice its uninterrupted course, without regarding orders issued under the great or privy seal; the stat. 11 Richard II. c. 10 adds to this, that no writing is to be issued under the signet or privy seal to the disturbance of the ordinary course of justice.

2. *The Continual Council* is the central department for the exercise of the sovereign and political rights in all directions—with reservation of the fixed spheres of the *jurisdictio ordinaria* and the ecclesiastical constitution. Here is the active seat of the royal political government, the legality of the proceedings of which is enforced by the bringing forward of national grievances in Parliament, or, in an extreme case, by an impeachment of ministers. By practice and statutes the personal responsibility of the principal officials has already been expressly recognized.

3. *The Magnum Concilium* in Parliament, finally, forms a supreme council of the Crown, periodically summoned, which includes the prelates and barons, and, in its widest extent, the representatives of the Commons also. The participation of each portion in the functions of a council of the realm has been laid down by parliamentary practice, and in such a manner that the participation in the highest extraordinary jurisdiction remains restricted to the Upper House.

In its intermediate position between the courts of justice and the Parliament, the Continual Council has been gradually coerced into a legal line of government. But the bitter conflicts of the age again and again proved that for the attainment of this end neither judicial officialism nor parliamentary meetings were in themselves sufficient, but that there was rather needed a ramification of the rights of political government into the district and local institutions, to form a counterpoise to the violence of the parties. All legal barriers imposed upon despotism have only become gradually effectual by the system of self-government, in which the wealthy classes assume the exercise of the political functions, and thus undertake the protection of the individual against abuses of the political power. Of this the Middle Ages always retained a lively sense, which the feudal system and the feudal courts on the one side, and the traditional Saxon

judicial institutions on the other, had engrafted upon the nation. By the blending of the nationalities both tendencies became fused together. Having advanced in person to the supreme government of the realm, the county and municipal unions comprehend in themselves both feudal and local law, military and municipal constitutions, ruling classes (prelates and nobles), and middle classes (knights and burgesses), all in a living organization.

It was out of this combination, individually and collectively, that the personal and political liberty of the nation proceeded. Counties and townships have become independent in consequence of their connection with the judicial system; the courts have become independent through their connection with the independent committees of the county and civic unions (juries). By its representation in Parliament the collective community system has become a permanent counterpoise to absolute political government. The peculiar nature of the English constitution has now become fixed by the formation of communal bodies for the service of the State. They are individually described as "counties," "ridings," "hundreds," or collectively as *communæ*, *communitates*; only in the cities has the first formation of "corporations" commenced, which in later times became the source of artificial deformities. As personal service and rateability in respect of taxes, were by principle combined together in the communal bases, so was it also the case in Parliament—only that in the case of the prelates and lords it was their personal participation in the affairs of Government, in the case of the *communæ* their rateability, which appears to be the predominant feature.

In accordance with the nature of the State there thus arises a relation of mutuality with respect to public rights. The liberties of Parliament are originally an emanation of the royal power. There exists no parliamentary right of bishops, lords, knights, and burgesses, which was not in its origin a result of royal grant. The maxim of the courts of that period, "*Tout fuit in luy, et vient de lui al commencement*" (Year-book, 24 Edw. III.), was fundamentally true. The development of the parliamentary constitution from a system of personal government was also discernible in the fact that the kings themselves, whilst mere children, were obliged to perform in person certain acts of sovereignty.

On the other hand, the title to the crown in this period had been more than once created by Parliament, and still more frequently were the rights of the Crown defended and maintained by Parliament. Under the house of Lancaster, at all events, the Crown was no longer based upon the ground of hereditary descent alone, but upon mutual acknowledgment.

Hence the maxim of the courts: "*La ley est la plus haute inheritance, que le roy ad; car par la ley il même et toutes ses sujets sont rulés, et si la ley ne fuit, nul roi, et nul inheritance sera*" (Year-book, 19 Hen. VI.).

The fixed elements of the political system of this period are to be found in the judicial system, in the systematic combination of the exercise of the sovereign rights with property, i.e. self-government, and in the perfectly stable ecclesiastical constitution. They are all represented in the Upper House as being the head of all judicial constitution and government, including the highest *jurisdictio extraordinaria*. The special rights of this high body are indeed described as "privileges;" but these privileges are political rights with an upward tendency, and are not (as in the *ancien régime* of the Continent) social advantages with a downward tendency. They afford to a supreme legislative council the necessary personal independence in dealing with the Crown and its paid servants; but involve no inequality in respect of family and property-law, no immunity from taxation, and no exemptions prejudicial to other classes of the people. The conservative portion of the constitution has already, at the close of the Middle Ages, become well fitted to guarantee the maintenance of the constitution and the conduct of the affairs of the realm according to the laws of land.

The moveable part of the political government has, besides this, an extensive province. Within the circle which law-courts, the Upper House, and the Church describe around the personal government, there is a wide domain, in which the "King in council" moves, and at his side the Commons, with their grievances and motions, with their initiative in legislation, and conditions annexed to taxation. The fixed sphere of political government becomes more extended in each generation; but in like manner also the moveable circles become expanded, owing to the continual fresh needs of the State and society. In the Middle Ages a narrow-mindedness is visible, which on the one hand would wish to pass all sovereign power through the mould of an established legal organization, while on the other hand, for the sake of immediately satisfying social demands, it would fain ride roughshod over every legal barrier. Both tendencies are represented in this constitution; the restless element pre-eminently in the House of Commons, with its preponderance of small burgesses. The instability of all representation of interests is here quite as visible in numerous small features as the party spirit of the magnates is seen in greater. The instability of such efforts and aspirations, combined with the violence of the Middle Ages, then points ever to the King, as being the embodiment

of the perpetual impartial sovereign power. Every collision of the estates with each other and with royalty, awakes afresh the consciousness that the source of all the rights of the great lords, and the last protection and support of the weaker classes lies only in the permanent sovereign power—that is, in the monarchy. At every encroachment of the Lords and their great parties, the jealousy of the Commons is aroused, and an altered tone is noticeable both in the lower ranks of society and in the Church. Often as the Commons, in those party struggles, follow the lead of the Lords, in the moment of necessity a king who is conscious of his vocation finds still in them his greatest support, and the grateful recollection that it is to the monarchy that they owe their liberties. A rising of the unrepresented classes against the monarchy never occurs throughout the whole of the English Middle Ages.

The constitution of Parliament has accordingly, in contrast to the Norman period, led to an exaltation and an enhancement of the royal dignity in spite of all the fluctuations and violence of this period. "There is," says Hallam, "nothing, absolutely nothing of a republican aspect. Everything appears to grow out of the monarchy, and redounds to the advantage and honour of the King. The voice of the petitioners is, even when the Lower House is in its most defiant humour, always respectful; the prerogative of the Crown is always acknowledged in broad and pompous expressions" (Hallam, iii. 158).

The people's conceptions of law were determined, as had ever been the case, by the customary legal relations, with a strong influence of recent impressions. The popular ideas of the royal power (\*) at the close of the Middle Ages could not therefore be simple ones. In the conceptions of those times State and society combine to form a threefold basis of royal power.

An old historical basis still existed in the idea of the suzerain ownership of the King in the soil, as *Dominus Angliæ*. The King was in fact still the greatest landowner in the country, as he was in theory the sole landowner. With the gradual dissolution of the feudal law in favour of private property, this conception becomes less prominent; it was shaken also by the change of dynasties. The recognition of this principle was, however, for the wealthy classes a necessity, because by legal construction it had become the source of all private rights in the soil. The English monarchy had thus attained a solid foundation of hereditaryity, such as the German empire could not claim. The doctrine of the jurists treats the succession to the throne according to the right of primogeniture in the same way as the succession to real

(\*) Cf. *infra*, the note at the end of this chapter.

property, from which also the expression "title" was borrowed. Like the succession in real estate, it follows immediately, and is *ipso jure* attached to, the title of possession residing in the predecessor. After Edward I.'s accession no interregnum was legally recognized in a succession to the throne (Allen, "Prerogative," 47).

The monarch represents, moreover, "the head of society," and as such is recognized by the forms and ceremonies of the court, which in the coronation festivities even reproduce the household of long bygone centuries. The old hereditary court offices of High Steward, Great Chamberlain, High Constable, and Earl Marshal still continue. Of the heads of the active court officials, viz. the King's Chamberlain and the Steward of the Household, the first has now become an active minister of State, and the second the managing head of the household. The splendour of the temporal as well as of the spiritual side of the Court was enhanced by the constitution of Parliament, not as a mere idle show, but in involuntary recognition of the necessity of raising the monarchy above the rich and brilliant nobility of this period, and thus to hold up the sovereign power in the public view above all the classes of society.(\*\*)

(\*\*) The courts of the Plantagenets, like the courts of all times, suggest reminiscences of an older social order of things. This is especially the case with the coronation ceremony, in which the old household of the head of a German clan is again revived, from the great honorary offices down to the smallest services. The office of the hereditary *major domus*, Lord High Steward, as the first court official, died out in comparatively early times, but was revived for coronation festivals and for a solemn peers' court, *pro hac vice*. The hereditary office of Lord Great Chamberlain continues even to the present day as an hereditary office, fulfilling the chief honours on the day of coronation. The office of the Lord High Constable, with his seat in the *curia militaris*, and his patronage of lower offices at court, in the army, and in courts of justice, continues during the Plantagenet times. The office of Earl Marshal, after many eacheatings to the Crown and re-grants, is at times hereditary, at times held for life, and then again a revocable honour. It was otherwise with the active court officials, who even in the preceding period formed a second class separate from the hereditary offices. A long list of this royal household under Edward IV. is given

in the *Liber niger Regis Angliæ*, printed with other documents by the Antiquarian Society (1790). The real administrative court functionary is, as in our day, the Steward of the Household. The remaining officers of the household (some of whom were also state officials) are the bishop confessor, the Chancellor of England, the Lord Chief Justice of the Common Pleas, the King's Chamberlain, bannerets, knights, secretaries, chaplains, equerries, keeper of the wardrobe, gentlemen ushers, yeomen of the Crown, grooms of the chamber, pages of the chamber, officers of the jewel-house, the physician, surgeon, apothecary, and barber of the King, the henchman, squires of the household, king-at-arms, heralds, serjeants-at-arms, minstrels, attendants and messengers; the dean of the chapel, chaplains and clerks, yeomen and children of the chapel, clerk of the closet, master of grammar, officer of vestiary, clerk of the Crown, clerk of the market, and clerk of the works. Besides these a secretarial staff of clerks of the board of green cloth, clerks of the control office and counting-house. Under departments: The bake-house, the larder, the pastry-kitchen, the cellar, the vintner, the beer-cellar, the tankard-house and bowl-house,

The Crown, as hereditary possessor and source of all magisterial power, forms in the legal and religious conceptions of the time the nucleus, compared with which all possessory and social conditions appertaining to the monarchy are only means to an end. As the conceptions become matured, new expressions for it come also into use. As the name "parliament" appears with the new conceptions of social right, so as its correlative the term "royal prerogatives" occurs. At first it meant especially the financial rights of the King, arising from his feudal suzerainty, all which should be as against the estates *a noli me tangere*; as in the *statutum de prerogativa Regis*, under Edward I. (formerly generally attributed to Edw. II.). In later times the judicial power appears as the centre of the prerogative, which appertains to the King of his own right independently of the ruling classes. But the more extended the tasks of the sovereign power become, the wider and more comprehensive becomes the notion of the prerogative, until it reaches the conceptions advanced by Coke and Blackstone. It is the same notion which the later German imperial law associated with the term "*Kaiserliche reservatrechte*," yet with the material difference, that these *reservatrechte* of the English monarchy embrace an extensive and actual *imperium*, and that the English parliaments have not, like the German imperial and provincial representative assemblies, forced their way into an habitual exercise of the sovereign and administrative power in all those functions which, in a well-organized political system, can only be securely centred in a single hand. In England also, as is always the case, many conceptions of later days have erroneously been attributed to the Middle Ages. The difference between the constitution at the close of the Middle Ages and the modern theories of constitutionalism lies principally in two points.

1. The King has the commanding and disposing power in State affairs (the *imperium*, the ruling power) which, as in the Carolingian constitution, is the source and basis of the royal prerogative. The immediate emanation from it is the right

beer-bearers, the spyary, the confectionary, the light department, the butler's department, the linen department, and the laundry department. How necessary such a complicated household was according to the notions of those days is shown us by the analogous household of the royal family and the magnates. The Black Book fixes the *etat* of the Queen at forty shillings a day, in addition to twelvepence each for one hundred retainers (£2555 annually); for the heir to the throne thirty shillings, as well

as a suite of fifty (£1560); for a duke and suite of two hundred and forty (£4000), etc. As a classification in almost all branches of the household, the division into serjeants, gentlemen and yeomen is revived, which was at the same time an expression of the social ideas of rank in those times. A royal body-guard of twenty-four serjeants-at-arms had already been formed by Richard I., which was employed as an active guard of honour for the Parliament, the Chancellor, and the Treasurer.

of ordinance; for what the King can command in single cases he can also ordain for similar ones. This right is now limited by parliamentary statutes, but not restricted to the mere "execution of laws." From this follows the right of appointing the organs of government. From all encroachments and excesses Parliament always voluntarily returned to the royal right of appointing the officers of State. Only a few offices, and those subordinate ones, are held by the feudal mode of "tenure." It is, moreover, a maxim of common law that all magisterial offices are held revocably during the King's pleasure; with the exception that the tenure of the judicial office for life had already become usual in practice. This ruling power comprises that which the later treatise of Blackstone describes as the "royal authority," that is, (1) the representation of the State towards foreign powers, decision as to war and peace and international treaties; (2) the military command over every branch of the armed force; (3) the King as the fountain of justice, with the rights of appointment which flow therefrom; (4) the King as supreme guardian of the peace; (5) the King as the source of offices of honour and privileges; (6) the King as the arbiter of commerce; and (7) the now very restricted ecclesiastical supremacy. But the difference between it and the conditions obtaining in the eighteenth century lies in this—that the numerous ambiguous points of sovereign rights, which have not as yet been determined by the legislature, make these powers appear as real rights, which are in normal times left to the personal decision of the King. As yet no party government, in the meaning of the eighteenth century, exists. The Church is as yet perfectly separated from the temporal State. As yet the real political government is united in the person of the King, his counsellors, and courts of justice. No parliamentary budget, no influence by the estates of a continual control of the incomings and outgoings of the State has yet been established. The financial centre is as yet in the King's hereditary revenue. It is to the King, and not to the Parliament, that the Treasurer presents a *status* of the revenues, an annual budget (as is mentioned for the first time, in 1421). As yet there was combined with the prerogative of the Crown the idea of an extraordinary dictatorial power residing in the King, which in any State crisis could thrust aside the self-imposed barriers, laws, and judicial constitution, and find a remedy by extraordinary measures, jurisdiction, and ordinances—an extraordinary power which was made frequent use of by the Tudors, and frequently abused by the Stuarts, and was only in later centuries further restricted and reduced to a minimum.



2. The King, and not the Parliament, has the legislative power. Law is only an ordinance strengthened by the consent of the estates, and which, not being one-sidedly capable of alteration, without the consent of the estates, represents the highest controlling force of the absolute power. The notion of a "*veto*" of the King is a modern interpolation; the English constitution knows neither the term nor the act. It is not the estates that have a legislative right with the reservation of a *veto*; but it is the King who gives the laws, subject to the co-operation of the estates: "*Que le roy fist les leis par assent dez peres et de la Commune, et non pas lez peres et la Commune*" (Year-book, 23 Edw. III.). The King is accordingly not bound to summon Parliaments at stated times. The promises made on this point (4 and 36 Edw. III.) remain intentionally ambiguous in their language, and are regarded as one-sided assurances without prejudice. The participation of the estates in the legislation is only understood in this sense, that the King shall not alone repeal what has been resolved with the co-operation of the three estates. Their consent does not, however, in principle abolish the right of the King to command and ordain. The Middle Ages regard the permanent statutes originally as agreements with certain and definite estates (*stabilimenta*); the higher idea of a law as being a supreme rule imposed by the majesty of the State upon all classes of the people has been only gradually inherited by the State from the Church.

As the Anglo-Saxon monarchy was built up upon the principles of the Carolingian empire, so now in the constitution that has been completed, the national leading ideas of State and Right enter into an organic fusion with society, in the old tripartite division (Gneist, *Rechtsstaat*, chap. ii.):—

The governing power and the right of ordinance as basis;

The judicial system as barrier;

The Law as the highest controlling force of the State will.

Shifting and but slowly established by experience are the boundaries between legislation, the ordaining power, and the executive power in detail. The last named is legally restricted by the obligation of the royal servants to execute the royal laws, and by the legal duty of the monarchy to administer justice; but to draw a strict mathematical line between the legislative and executive power was proved by practice to be impossible. The English Parliaments have only become effective legislating bodies by their continual participation in government and by the habitual activity of their members in county and municipal administration. The right of the estates

to concur in decreeing the laws led to a constant interference as to their application, this, in small as in great matters, being the custom of Germanic peoples. The right of Parliament to grant taxes proved itself perfectly sufficient to lend to this interference both support and effect; indeed, it appears more than sufficient for the purpose. The Parliaments of the fifteenth century, like the German Landstände, claim a voice and intervene occasionally in all matters, in war as well as peace, in diplomatic negotiations, in ecclesiastical affairs, in the internal administration of the royal household, in the appointment of the officials, in the administration of justice; no interest is too small for them and none too great, no attribute of the Crown is excluded. This encroachment, which was at times excessive, is, however, easy to explain, if the original state of the Norman administrative law be borne in mind. That system of absolutism could only be reduced to fixed administrative maxims by thousands of national grievances; and by means of continual complaints a fixed administration was thus gradually produced by hundreds of laws and administrative ordinances, in the course of many generations. Where such an end has been attained, as regularly and uniformly as the ebb follows the flow, a reaction occurs—an ever-popular reaction and willing renunciation of acquired and apparently important rights. This thoughtful moderation is not merely the outcome of a providential peculiarity on the part of the English nation, but of a different political school of experience, through which the German Reichstände and Landstände were never so happy as to pass. These Parliaments had from the first sufficiently experienced the pernicious effects of a party government with a ruling apparatus centralized after the Norman fashion. These wealthy classes learnt, by daily exercising the magisterial functions of self-government, the necessity of a permanent organization of the administration. These Parliaments, in their constant connection with the central government, early experienced that a right of ordinance was indispensable for the sovereign power, and that an exhaustive circumscription of the sovereign power by statute was as preposterous as it was impossible. Upon the same basis the gradual definition of the parliamentary privileges by precedents arose. Moreover, the ever-recurring collisions between the legislative assemblies and executive organs are at once the weak, as they are the strong, side of all our national constitutions. A strongly defined individual sense of right shows itself in these collisions, and it is to them principally that England owes the progressive improvement in its administration. In this department, however, all government by Parliaments is ex-

perimental. The evil consequences that had arisen from the excesses of the principle of election and party rule led by experience to the adoption of the fundamental maxim, that judicial and magisterial posts may not be filled by election, but only by appointment.

Certainly these conditions were as difficult as in any modern constitutional system. Even in those times an older ruling class (prelates and barons) confronted the young electoral assemblies of tax-payers. The aspirations of the one class to a share in the State could no more be repudiated than the rights of the other; for the State required the money, the military, judicial, and police service of the one quite as clearly as it did the military power and business experience of the other. Beyond doubt the Commons of the fourteenth century were originally as inexperienced in the real needs of a great State as the newly enfranchised voters of the nineteenth century. It became almost proverbial, that the sagacity of the commoners in discovering the grievances of the country bore no proportion to the unpracticalness which they frequently displayed in redressing them. Beyond doubt their immediate wishes, conceptions, and proposals were often incompatible with the working of the State and with the claims of the prelates and *seigneurs*. And yet the proper government of the country resided in a monarchy advised by its continual council. In spite of all encroachments of the Upper House, and sometimes also of the Commons, under every capable and under every conscientious King, the reconciliation of what was apparently incompatible was brought to pass in a harmonious alliance of rights and duties, out of which, despite all storms, parliamentary liberty emerged triumphant and the nation mighty. Parliament has always finally yielded to "political necessities," granting what was demanded by King and council. In spite of all passion and violence of factions, a spirit of patriotism and a sense of justice pervades this epoch until the crowning catastrophe of the Wars of the Roses—a spirit which is founded upon the uniform habituation of the wealthy classes to the personal exercise of their political duties. There are here the living elements of an internal harmony, in which property, political duty, and political right are balanced, in which the independent will of a free people imposes upon itself self-created laws. In the period of Edward I. and Edward III. and in the middle period of the house of Lancaster this harmony is manifested in a powerful development of the external and internal energy of the State, which causes it to be the most glorious period of English military history. There was only needed the restoration of a certain and incontestable succession to the crown, to

put this political system into such a position that it could perform new and important tasks.

NOTE TO CHAPTER XXIX.—The legal conceptions of the royal power are now materially different from those of the time when (in 15 John) the English barons rose with weapons in their hands to remonstrate against the treatment of the country as a general farm of the Crown, and when in 48 Henry III. they had conquered a king in open battle. The impressions of these events are expressed by Bracton (ii. 16, sec. 3) as follows:—“*Res autem habet superiorem, Deum scilicet. Item legem, per quam factus est rex. Item curiam suam, videlicet comites, barones, qui comites dicuntur quasi socii regis, et qui habet socium, habet magistrum, et ideo si rex fuerit sine freno, id est sine lege, debent ei frenum ponere.*”

This cavalier manner of expression may faithfully enough express the conception of the knighthood. The monkish and the popular view of the times are shown in a thoughtful political poem, “The Vision of Piers Plowman,” which, in estimating the events, comes to the conclusion that if the King allows himself to be led astray and sanctions all manner of harm, or out of wilfulness sets his power above the law, the magnates have a right to save the land from such errors. The King should consult his community, to whom their own laws are certainly well known; subjects are wont to be better informed in the common law than others. But at the same time it is still necessary that the King should choose his servants, without being bound to certain men (Lappenberg-Pauli, iii. 726). The conception of a duty of the Crown to administer justice and an aversion to a purely personal rule shows itself clearly again and again. “*Ipsæ autem Rex non debet esse sub homine sed sub Deo et sub Lege, quia Lex facit Regem; attribuat igitur Rex Legi quod Lex attribuat ei, videlicet dominationem et potestatem; non est enim Rex ubi dominatur voluntas et non Lex*” (Bracton, iii. c. 9). In about twelve passages Bracton ever recurs to the dominion of the law and the King’s duties: “*ad hoc creatus est, ut iusticiam faciat,*” etc. These conceptions are primarily rooted in the conception of a reciprocity in feudal duty, as consisting of protection on the one side and fealty

on the other. But they are still more deeply rooted in the Germanic popular idea of the duty of the magistrates to administer justice. As Stubbs justly remarks touching the frequently one-sided prominence given to fealty: “Fealty is the bond that ties any man to another to whom he undertakes to be faithful; . . . homage is the form that binds the vassal to the lord; . . . allegiance is the duty which each man of the nation owes to the head of the nation. . . . But although thus distinct in origin, the three obligations had come in the Middle Ages to have, as regards the King, one effect” (Stubbs, iii. 514).

Upon this broadest basis the jurisprudence of this time laid down the severest penalties of high treason for violation of the allegiance to the King, which were modified in their exaggerated severity and extent from time to time by parliamentary legislation. By the dynastic struggles men were also compelled to uphold a King *de facto* as entitled to allegiance, whereby the recognition of the monarchy as a political institution is necessarily acknowledged. In harmony with this constitutional obedience of the subjects to their legally acknowledged King, is the duty of the King to observe the laws which he has himself imposed, which was after Edward II. incorporated into the coronation oath. Parliamentary legislation now frames fixed rules for the exercise of the royal prerogative, which become a portion of the common law, and which the King can no longer repeal or alter at his own instance. The observance of these bounds is enforced by the responsibility of the royal servants. Parliamentary practice has matured all former postulates to this one definite notion, viz. that the parliamentary government is, according to its proper nature, a political government according to law. Even Bracton opposes the Roman maxim of absolutism: “*Quod principi placet, legis habet vigorem*” by the English “*legis habet vigorem quicquid de consilio et consensu magnatum et rei publicæ communi sponcione, auctoritate regis, iuste fuerit definitum.*” A chief justice of the King’s Bench under Henry VI. (afterwards tutor to the heir to the throne of the house of Lancaster in

banishment) expresses the same fundamental idea by contrasting a *political government* (according to law) with a *regal government* (according to personal will). Fortescue's treatise, "*De laudibus Legum Angliæ*," c. 9, expresses this for the edification of a future King in a strong condemnation of arbitrary government. It is true, the administration of justice found itself in no small embarrassment, owing to the circumstance that the older royal ordinances before Edward III. were yet to have the authority of the *statuta*, the laws passed with the accord of Parliament. Bracton helps himself by the confused interpretation that the law of the land could not, indeed, be altered without the consent of the estates, but that an emendation of the statutes was admissible by ordinance without Parliament. "*Leges Angliæ, cum fuerint approbatæ consensu utentium et sacramento regum confirmatæ, mutari non possunt sine communi consilio et consensu eorum omnium, quorum consilio et consensu fuerunt promulgatæ; in melius tamen concertari possunt etiam sine illorum consensu*" (I. c. 2). In the course of the dynastic struggles the idea of the sovereignty of the people at times emerges, that idea which attributes the law to the general will of the people.

This is even found in Fortescue, "*De Laudibus*," c. 13, "*Rex hanc potestatem habet a populo effluam*," whence even in those times the erroneous deduction was sometimes made that the King has no further powers than those which have been given him by the law; whence, further, the denial of an independent right of ordaining in the province of the administration would necessarily follow. Parliamentary practice convinced itself of the necessity of binding ordinances, and understood a royal government according to law quite rightly, as being a government within the limits of the law, which the King cannot of his own initiative repeal or alter without the consent of Parliament. What ought least of all to be sought for in the Middle Ages are reliable statements as to the remote past. Under Edward IV. the judges declared with one accord "that all the royal courts of law exist from before the memory of man, so that no one can know which is the oldest." By this scale we must intelligently measure the genealogical trees which have been fabled for the Upper House and the Lower House, fancy ideas of Saxon laws and the wise institutions of the good King Ælfred, as well as the tradition of the Anglo-Saxon constitution.

## FOURTH PERIOD.

*THE AGE OF THE TUDORS AND OF  
THE REFORMATION.*

## CHAPTER XXX.

*The Restoration of Constitutional Government.*

HENRY VII., 1485-1509.  
HENRY VIII., 1509-1547.  
EDWARD VI., 1547-1553.

MARY, 1553-1558.  
ELIZABETH, 1558-1603.

THE retrogression of the English constitution in the last half century of the Middle Ages, that apparent relapse into the stormy condition of the thirteenth century, is primarily attributable to a coincidence of personal circumstances. The legal relationships of the clergy and the nobility certainly still contained considerable difficulty and want of harmony (Chapter xxviii.), but it was only in consequence of the weakness of mind of Henry VI. that this degenerated into a dynastic aristocratic civil war. The political suicide of the Barons in this wild conflict, and the exhaustion which followed the war, could not but tend to strengthen the monarchy as an institution. The knighthood and the cities were in a great measure drawn into these struggles,—much against their will, for, from their social position, they were more bent upon the peaceful development of their insular political system in both county and parliamentary organization; and even the increasing yearning of the lower orders after independence was more inclined towards a royal government than an organized rule of nobles. A newly consolidated monarchy, which sagaciously approached this social tone of the times, could rest assured of a strong support from the mass of the people.

The Tudor dynasty and Henry VII. from the first grasped the situation clearly. In the last generation the military ascendancy of the great lords was seen to be the chief danger

the monarchy had to fear. Naturally the newly consolidated dynasty addressed itself first of all to the most urgent task—the abolition of the military liveries of the magnates. When the great struggle of the nobles had fought itself out, the numbers, wealth, and energy of the old families had of themselves disappeared. Though many heirs bearing old names were reinstated in their titles and honours, yet they did not regain their old possessions intact, nor their old position in respect of armed retinues, nor yet their old princely standing in the country. To keep the great barons in subjection is the principal scheme of Henry the Seventh's policy, in pursuit of which he, like his contemporary, Louis XI., appears sometimes even to have forgotten that a King is bound by honourable obligations. He kept a firm hold over his nobles, says Lord Bacon, and preferred ecclesiastics and jurists, who, although they leant toward the interest of the people, were more submissive to him. The equivocal financial artifices of his Treasury supplied him so well, that in the last seven years of his reign he only needed to summon a Parliament on one occasion.

In a more royal manner did his successor, Henry VIII., pursue the same policy. By the publication of State papers, new light has been thrown upon Henry VIII.'s merits with regard to the internal administration of the country, so that the most modern historians are inclined to estimate them too highly rather than too low. So much is correct, that the political administration displays now for the first time a systematic care for the labouring classes. Anticipating what has in later times been called enlightened despotism, we find a regulation of wages and provisions; prohibitions of the depopulation of the land by leases of enormous tracts and conversion of arable into pasture land; prohibitions even of inventions for displacing manual labour; real provision for education, industry, and care of the poor, even for popular amusements; friendly regard for guilds, workmen's unions, and trading companies, and other measures, all framed as well as the time understood. Henry's merit in choosing out able officials is undeniable, as is the acuteness with which he understood how to place the right man in the right place. And these endeavours awoke not only a grateful response in the hearts of the poorer classes, but also an unfeigned recognition by intelligent contemporaries. The success of this administration, in internal peace and prosperity in town and country, is undisputed.

In the discharge of such tasks the secular administration remains unchanged. The only armed force of the country is now the militia, under officers and the landed gentry. The

old feudal array has disappeared, and is replaced by land-taxes and fees on change of possession. In the judicial and police administration the office of justice of the peace becomes more influential by reason of the augmentation of the quantity and of the importance of its business. Beginning from below, the parishes, now that the legislature imposes upon them the economic humanitarian duties of the Church, form themselves into independent local bodies. It was not until the sixteenth century that the district and local systems became compact, independent units. As in this substructure of the constitution the principles of the period of the growth of the estates continue, their fusion together into a Parliament continues also. The formation of the Upper House follows the legal principles already existing, as does that of the Lower House. The English fundamental idea of the exercise of the royal sovereign rights by the wealthy classes, and the legislation resulting therefrom with their advice and their consent, is consistently continued.

Whilst in this manner the secular side of the State displayed a continuation of the existing conditions, about the middle of Henry the Eighth's reign a new task presented itself to the dynasty, the solution of which became its historical mission. The estrangement of the Church from its moral vocation had by this time reached a culminating point, which demanded solution. At first Henry VIII. undertook to settle the dispute between the ecclesiastical and temporal State from personal motives, and achieved his object in an energetic though ruthless and violent manner. The exclusiveness of national life and national will in England had come more and more into antagonism with the Roman Church, with its unpopular privilege of jurisdiction and its foreign head. If the Church was to become a national Church, as the popular voice demanded, then must the head of the State take the place of the foreign bishop. But in his position as the ruling head of the Church, the King became again absolute lord in that half of the State which had been hitherto organized as a Church. The ecclesiastical powers pass, in the first place, to the King as a *gouvernement personnel*, and become consolidated into a spiritual council of the State. The episcopal office becomes now subordinate to the King in council, in the form of an administrative bureaucracy, *durante bene placito*. With the episcopal office the parochial clergy becomes subordinate to the new administrative organization. With the alteration in their possessions and in their official position the clergy loses the character of a separate estate, and becomes welded into the system of the royal political administration. The old powers of the ecclesiastical régime,



the old authority of the "holy Church," the customary relation of allegiance of the laity to the Church, form a chain of new powers of the Crown. The relations between Church and State from that time to the close of the period stand in the foreground, and are of such all-engrossing interest, that it appears appropriate to review: first, the *permanent* elements in the history of the period, viz. the development of the county-system, and the constitution of Parliament (Chapters xxxi., xxxii.), and then the Reformation, the new organization of the State Church, and its effects upon the fundamental character of the royal government (Chapters xxxiii.-xxxv.). (a)

(a) Of the sources and literature of this period we may point out the following:—

1. The records of statutes, which are, after 4 Henry VII., exclusively in the English language. The separate Statute Rolls end with 9 Henry VII., and are merged in the *Rotuli Parliamentorum*. The complete legislation of the period is contained in the official collection of laws (Statutes of the Realm, 1810, *seq.*), vol. ii. pp. 499-694; vols. iii. and iv.

2. The parliamentary proceedings after 12 Henry VII. exist in the *Rotuli Parliamentorum* as original documents in the Parliament Office. With 1 Henry VIII. the official "Journals of the House of Lords" begin, printed with a general index, and a special calendar from 1 Henry VIII. to 30th August, 1642. The "Journals of the House of Commons" begin with 1 Edward VI. (1548).

3. Other State papers of immense extent exist in the Record Office, and are published in numerous series. The proceedings of the council of the realm (Sir H. Nicolas, "Proceedings," etc.) extend down to 33 Henry VIII. The State papers of the time of Henry VIII. are in print, vols. i.-xi. (1830-

1852). "State papers" (1571-1596), by Murdin, 1750, fol. "A Calendar of the State Papers, 1547-1580," by R. Lemon, 1857, with continuation.

4. "The History of the English Law," by Reeves, 1815, embraces in vols. iv. and v. the period of the Tudors. Sir Edward Coke's "Institutes," Part II., form a chief authority for public law.

5. For the general political history: Hallam, "Constitutional History," vol. i.; Lingard, "History of England" (from the Catholic point of view). With extensive studies of the sources: Froude, "History of England since the Fall of Wolsey," etc., 1858, *seq.*, vols. i.-xii. (a spirited apology for the Tudors, especially Henry VIII.). Pauli-Lapenberg, "Geschichte von England," vol. v. (down to Henry VIII.). Ranke, "Englische Geschichte," especially in the sixteenth and seventeenth centuries, vol. i. (1859). For limited purposes: Fr. Bacon, "Historia Regni Henrici VII." Amst., 1662. Lord Herbert, "Life and Reign of Henry VII.," 1649 (official). Camden, "Annales Brit. regn. Elizabeth." Th. Smith, the "Commonwealth of England," London, 1589 (for the political situation in Elizabeth's day).

## CHAPTER XXXI.

*The Development of the County Constitution.*

THE fundamental institutions, upon which the vital energy of the parliamentary constitution is built up, were developed and extended by the Tudors in a manner that of itself affords us sufficient proof that these monarchs sincerely desired the maintenance of the constitution. The combination of the sovereign rights with the local system continues in every direction, and, striking its roots deeper down, draws the smaller households into the activity of self-government.

I. The militia system gains in importance by the fact that it forms the sole legal force of the country. The old feudal arrays are now in practice abolished; the aim of the Tudors is unwaveringly directed towards abolishing the retinue and condottiere system of the higher nobility. A return to conditions similar to those under the house of Lancaster has become impossible, owing to the fact that a great foreign war has been avoided, and the nobles have gradually become unaccustomed to regular campaigning. (1) The whole care of the Tudors was, on the other hand, concentrated upon the county militia, which in the Scotch wars, and yet more frequently on the Continent, had proved itself efficient. For cases of need, the custom was revived of compelling the counties to furnish a definite number of men. The legislature assisted in this matter by certain provisions touching the military service of the royal vassals and officers (19 Henry VII. c. 1, and special statutes), and touching the military subordination of the men to the captains set over them. Under Henry VIII. for the first time extraordinary commissioners were appointed

(1) Compared with the militia system of this time the remains of the feudal militia are only sporadic phenomena. In like manner the material dies out with which the battles of the Roses were fought. The Marches on the borders of Wales and Scotland, as military governments with a feudal aspect, were abolished under Henry VIII. As a natural consequence of

the situation, the provincial nobility on the borders retained a military character down to the time of the union with Scotland. The habitual exercise of arms was comparatively general among the population; in consequence of which, in the county of York alone, the men capable of bearing arms were estimated at 40,000.

for this purpose, who, as lieutenants of the King (in later times lord lieutenants), furnish the required number by forcible recruiting. In the times of the Catholic troubles in 3 Edward VI., such lieutenants are mentioned for the purpose of "bringing the counties into military order." These powers were legally recognized by stat. 4 and 5 Philip and Mary c. 3, which presupposes the existence of such royal lieutenants. At the same time, by a new militia statute (4 and 5 Philip and Mary c. 2), the liability to bear arms was graduated afresh, and a suitable change made in the military system. The militia statute distinguishes all secular persons with *free landed estates* according to the scale of £1000, 1000 marks, £400, £200, £100; 100 marks, £40, £20, £10, £5: and next, persons in possession of personal estate of 1000 marks, £400, £200, £100, £40, £20, and £10. According to this scale the liability to an equipment of a greater or lesser number of persons was determined. Other persons of yearly incomes, either from copyhold or entailed estates of the clear annual value of £30 or more, are to be burdened according to the scale of personal property; all other inhabitants who are not specially contained in the former scale, are to keep at the public expense such equipments and arms as the royal commissioners shall determine. The justices of the peace have to superintend the procuring of horses and accoutrements. At times when the armed force is assembled, offences in service shall be summarily punished by the commanding authorities. In a state of actual war, according to 7 Henry VII. c. 1, 3 Henry VIII. c. 5, 2 and 3 Edward VI. c. 2, sec. 6, 5 Elizabeth c. 5, desertion is punished as felony. Even when in later times James I. repealed this chief statute, the *Mustering Statute* still remained in force; only the definite gradations of the liability to military service were abolished, but the administrative powers for recruiting the soldiery, and the penal laws affecting desertion, were retained. (1<sup>a</sup>)

(1<sup>a</sup>) The commissions of array of this period are not quite in harmony with the earlier parliamentary statutes, which confine the employment of the militia to foreign wars. But the Parliament found it to be to their general interest to allow the government a wider scope for action, so as to avoid a recurrence to the old feudal service. Moreover, the Tudors felt no need for introducing standing armies, either for the national defence, or for extending their sovereign powers. Some scruples were in later times aroused under Elizabeth by the application of martial law to civil persons. Elizabeth proclaimed martial law for the first time

after the rebellion in the North, in the year 1570, but on the representations of her council desisted from the application of it, evidently out of regard to Magna Charta. Yet, in 1588, when an invasion of the Spaniards was imminent, an ordinance was issued, which provided that the circulators of papal bulls and revolutionary pamphlets should be punished by the military commander. In the year 1595 a provost-marshal was even appointed by commission to seize, on the information of the justices of the peace, "notoriously rebellious and incorrigible offenders," and to have them hanged in the presence of the magistrates.

II. The judicial system is in this, as in the following, century the most stable part of the political system, the only progressive element being in the office of justice of the peace. Apart from this the system is unchanged, based upon judge and jury, and upon a systematic co-operation of royal officers and committees of the townships in the civil and criminal assizes, and in the quarter sessions of the justices of the peace. The lists of jurors are, in the old fashion, formed of the usual class of persons, the necessary members for each county assize being furnished by the sheriff, and in the municipal quarter-sessions by the secretary to the court. The qualification for service on a jury was raised by 27 Elizabeth c. 6, in order to correspond with the change in the value of money, from forty shillings freehold to £4, and the rating of a knight's fee was at this time reckoned at £40 instead of £20 rent. The fact which has to be decided by the jury, is in practice reduced to a regular trial by means of witnesses, in which the jurors return a general verdict upon the evidence brought before them. By 1 Edward VI. c. 1 the admission of witnesses for the defence in the proceedings in evidence before the jury is legalized. The continuous co-operation of judicial officials and committees of the townships, in which knights, citizens, and peasants meet together each year, still forms the actual nucleus of the municipal constitution. In certain cases the jury shows itself partial out of sheer fear, or is empanelled in a partial manner by officious sheriffs. But it is so closely interwoven with the legal conceptions of the times, that Henry VIII. constitutes the commissions of his Royal High Court with a jury, and extends the jury system also to the Court of Admiralty. Existing abuses led to the stat. 8 Henry VII. c. 1, introducing a summary penal procedure before the justices of the peace, on account of "concealments of inquests," against juries who fail in their duty; but this procedure was found impracticable. More serious was the later penal jurisdiction of the Star Chamber, which sometimes visited the juries with rebukes, and with pecuniary fines, or even threatened them with imprisonment. Nevertheless, there was as yet nothing like a

The Queen guarantees in advance indemnity to the officials for these illegal proceedings.

The new military code of 4 and 5 Philip and Mary, has, as before, for its chief subject the duty of equipment, which makes serious demands upon the wealthier classes, upon the landowners of £1000: six horses with weapons for the heavy armed, ten horses with weapons for the light cavalry, forty

lighter suits of armour, forty thin-plated suits of armour, thirty long bows, thirty helmets, twenty halberds, twenty arquebuses, twenty light helmets, and so forth downwards. "*Liberi homines*" are no longer spoken of, but copyhold and every kind of personal income is rendered liable. Cap. 8 contains also the penal rules directed against such as avoid the muster.

powerful tendency militating against the independence of the jury. (2)

In addition to this current administration of justice by judge and jury, the sheriff's county court still continues; by 2 and 3 Edward VI. c. 25 the regular holding of this once in each month was enjoined. The idea of the institution is, however, rather to procure a periodical discharge of the current business of the county, beside which the remains of a civil jurisdiction in petty affairs are gradually decaying. As an assembly of suitors, the county court appears for the same reason almost of nominal importance, and politically important only by reason of the business of county elections. (2<sup>a</sup>)

The local court leet still lingers on in some places with a portion of its old functions. Just as decayed, and, as a rule, only active in non-judicial business, are the old manorial courts. The civil jurisdiction which had been granted to certain cities appears at this time to have remained side by side with the assizes in full practical working.

III. *The county police system* shows an extension of the office of justice of the peace in a threefold direction. (3)

(2) The factious spirit of the age had certainly, at the beginning of this period, affected the jury. Not only the statutes, but the historians also confirm the fact that the results of the Wars of the Roses had affected juries, and were partly the occasion of the institution of the Star Chamber, "since the good order and peace of the realm were imperilled by illegal institution, corruption, dishonest behaviour of the sheriffs in the preparation of the jury-lists, bribery of the jurymen, etc." The Star Chamber had, moreover, in the era of the Tudors, not as yet disturbed the course of the ordinary administration of justice. For single attempts to intervene against the verdicts of juries by penal sentences, see Hallam, "Constitutional History," i. c. 1; as to a certain dependence of the jury under Elizabeth, see chap. v. of the same. As a rule the Star Chamber was contented with an apology. Only the case of the acquittal of Nicholas Throckmorton under Mary made much noise among the contemporaries. The jurors were thrown into prison after their verdict. Four of the number who confessed their guilt were set at liberty; but the rest, who endeavoured to justify their conduct, were condemned by the council to fines of one thousand to three thousand marks, which were, however, in the end

partly remitted. The dangerous statute, 11 Henry VII. c. 3, which gave the justices of the peace a summary penal jurisdiction by virtue of penal statutes, was the outcome of financial influences; but after the innovation had made itself thoroughly unpopular, on Henry VIII.'s accession the leading officers, Empson and Dudley, were sacrificed, and the whole institution was repealed by 1 Henry VIII. c. 6.

(2<sup>a</sup>) In accordance with the statute 14 Edward III. c. 7, the sheriffs were annually presented to the King by the Lord Chancellor, the Treasurer, and the judges (State Papers, i. 114). The under-secretary in the Remembrancer's office had for this purpose to keep a list of the persons who were named by the high officials as qualified (Thomas, "Materials," 12). The sheriffs still annually present their accounts in the Treasury, as enjoined by 35 Henry VII. c. 16.

(3) As to the police system, cf. the detailed description in Gneist, "Gesch. des Self-Government," 291-308, in which the almost insurmountable mass of legislation has been arranged under leading points of view. For the extension of the office of justice of the peace, Reeve's "History of the English Law," vols. iv. and v. (notably vol. v. p. 227 seq.) contains much matter.

1. The justices of the peace are charged with the duty of the preliminary investigation in criminal cases of all kinds. This new position is attached to the right of taking bail of the accused (3 Hen. VII. c. 3), which was by a general regulation (1 and 2 Philip and Mary, c. 13; 2 and 3 Philip and Mary, c. 10), determined as follows:—that at least two justices of the peace, one of whom must be learned in the law (forming a *quorum*), present at the same time, were to take the bail and report it in a despatch under their own hands to the next ordinary criminal assize. But before this is done, they must draw up in writing an *examination* of the party arrested, and an *information* by those who bring him in, touching the facts and the circumstances of the case, so far as this is essential to the proof of the crime, and send it in to the criminal assizes. Thus was legally instituted a hearing of the party accused and an examination of the witnesses by way of preliminary proceedings, and the justice of the peace was at the same time empowered, by taking security, to bind over the prosecuting party and the witnesses to prosecute and to give evidence in the subsequent judicial sittings. This preliminary inquisition can take place in every case, whether bail appear acceptable or not, and forms the preliminary examination in the English trial, as it exists in our day. In addition to this extended function of the justices of the peace, there stands in the background their higher position as a regular criminal court with a jury in the quarter sittings of the bench, which in the general form of the commission rivals the criminal assizes of the itinerant justices. (3<sup>a</sup>)

The statutes of this century are of exceedingly wide scope and often prolix. The comprehensive work of Lambard, "Eirenarcha, or the office of a Justice of the Peace," which in its different editions (1579–1619) gives an exceedingly clear survey of the progressive extent of the office, may almost be ranked as an original source of information. The further advance of the office is to be gathered from the editions of Dalton's "Justice of the Peace," 1618. The party struggles of the Wars of the Roses had left a legacy of a spirit of passion and demoralization in a generation that had grown up under party struggles. The statute fixing the limits of the penal jurisdiction of the Star Chamber (3 Henry VII. c. 2) was also directed against the abuses of the office of justice of the peace; but this was probably occasioned by the state of the times.

(3<sup>a</sup>) The practical development of

the police control takes this course, that the original liability of the whole tithing passes to the "reeve and the four men," whilst that of the hundred passes to the grand jury. The latter now relieves the local unions of the difficult duty of presentments, by hearing the informer, gaining sufficient information from the evidence to draw up an indictment upon its own responsibility, which had originally to be done by the individual hundreds of their own knowledge and information upon their oath. If we consider what an extraordinary relief was afforded the tithings and hundreds by this proceeding, we can understand that these innovations of practice were on all sides as willingly adopted as was in somewhat later times the inquisitorial activity of the paid officials on the Continent. Thus arose the procedure before the grand jury as it continues to the present day. In this exercise of

2. Secondly, a consolidation of the *police laws* of the Middle Ages was effected, primarily with the object of making them more easy of individual application. Even where no important and material changes had been made in the statutes already passed, this extended legislation is made ready to the hand of the justices of the peace, and at the same time extended to new and important spheres.

The regulations affecting labour, for which the justices of the peace are the successors of the old justices of labourers, become consolidated into a great system, connected both with police and with the poor law establishment, which was finally completed in 5 Elizabeth c. 4. This statute contains a long list of pecuniary fines (information to be laid before two justices of the peace, with a share to the informer), coercive measures to be taken against unemployed persons, domestics, or those belonging to industrial trades, regulations affecting domestic service in the country, rules affecting the servants' characters, police jurisdiction regarding notice and disputes in service, and regulations affecting the amount of wages and hours of labour. With this law and that relating to the poor, a system of compulsory apprenticeship was intimately connected, which was enforced by order of the justices of the peace as well against pauper boys and girls as against their masters.

The legislation against vagabonds and beggars (89 Elizabeth c. 4), which is connected with this, gave rise to a complicated system of magisterial powers affecting domicile, vaga-

the centralized presentment-duty it became more and more evident that the function of the bench was limited to legal decisions (in this case to the inquiry whether the indictment is founded well). The other steps in criminal prosecution are only proper to be dealt with by individual officials. Accordingly the method was adopted which the legislature had taken in the case of the office of police magistrate; that is, a devolution of certain functions from the body of the justices of the peace to individuals. The individual justices of the peace undertake accordingly: (1) the "previous information" by hearing the accused and the principal witnesses for the prosecution, that is, the same matter as had been originally left to the hundred jury *privatim* as preliminary to their verdict. (2) They decide upon this information as to the acceptance of any proposed bail. (3) They send the matter they have collected on information to the next assizes or quarter sessions (with

or without the person of the accused), to obtain there the verdict of the grand jury. This "commitment" again relieves the communities of a wearisome duty; for originally the hundred was obliged to present the indictment personally by twelve of their number. (4) The justices of the peace provide at the same time for the future "trial in court," by binding over the informer and the principal witnesses to appear on the occasion. This duty of informing and hearing witnesses is again only an emanation of the old duty of the community to present their members who have knowledge of the deed for the purpose of *veritatem dicere nec celare*. What accordingly was the duty of the community individually and collectively is now performed by the informer and the witness in the name of the rest. Thus arose the practice of preliminary examination as it now exists, and which received a desirable assistance from the law (Coke, Inst., iv. 177).

bonds' passports, and the payment of transport and criminal expenses.

- (c) The trade regulations of Elizabeth (5 Eliz. c. 4), introduce for the civic trades, so far as they have the character of a technical handicraft, a seven years' apprenticeship, in addition to a magisterial jurisdiction of the justices of the peace over disputes between master and apprentice. Side by side with this is continued the earlier legislation touching the manner of carrying on certain trades, particularly woollen manufactures, brewery regulations, butcher and baker regulations, and the like, with the intent to secure honest labour to the public.

- (d) Under the Tudors a beerhouse licensing system was introduced by 7 Henry VII. c. 2, 5 and 6 Edward VI. c. 25. Analogous is the necessity of licences for buying up or dealing in corn, butter, and cheese, according to 5 Elizabeth, c. 12, sec. 2. (8°)

- (e) As a result of the Reformation, a penal legislation is set on foot against papists, conventicles, and dissenters, after 5 Elizabeth—a peculiar province and one that offends our religious ideas,—the application of the penalties of *præmunire*, and in many cases even of high treason, to religious nonconformity, and the inflicting of pecuniary fines to enforce external conformity. This penal system was at first directed against the papists, but afterwards also against the sects which dissented from the State Church. (8°)

(8°) The following may be noticed as supplementary:—

The system of the regulations affecting labour developed itself under the Tudors to a legislative machinery bound up intimately with police and poor laws. This magisterial treatment of "labour for hire" attains its culminating point in the stat. 5 Elizabeth c. 4 (which in the main is still in force), interspersed with a long list of rules for servants, labourers, and artificers.

The licensing system for public-houses is new. By 5 and 6 Edward VI. c. 25, two justices of the peace may prohibit the sale of beer in low houses and taps, and allow no alehouse which has not been publicly licensed at the sessions and by two justices of the peace. "And that the said justices of the peace shall take bond and surety from time to time by recognizance of such as shall be permitted to keep any common alehouse as well for and against the using of unlawful games as also for the maintenance of good order." The quarter sessions shall further investigate whether any act has been committed by the innkeepers which

justifies a forfeiture of the security they have given.

A new subject of legislation is the regulation of the government of prisons. The houses of correction had from the first served the purposes of the police in supplementing the poor law administration, and for those averse to labour, beggars, runaway servants, and vagabonds (Coke, Inst., ii. 725-732). The old county prisons, on the other hand which legally belong to the ordinary administration of criminal justice, still remain under the inspection of the sheriff, whose right was expressly confirmed by 14 Edward III. c. 10, 19 Henry VII. c. 10, 23 Henry VIII. c. 2.

(8°) The single acts that are of practical importance for this period are: "*Agnus Dei*"; the importation of church pictures, crosses, etc., threatened with the penalties of *præmunire* (13 Eliz. c. 2, 3, 7, 17; 23 Eliz. c. 1 sec. 2). "Books and relics;" two justices of the peace shall search for Catholic books and relics, and destroy them when found; crucifixes are to be broken at the quarter sessions. "Jesuits and priests" (27 Eliz. c. 2. sec. 13). "Impugning



All these functions were committed sometimes to one, sometimes to two, or in rarer cases to three, four, and six justices of the peace. The point of view was in this respect an empirical one, according as, from the nature of the business, the assistance of a justice of the peace, learned in the law, was considered advisable, or for other reasons a mutual control was preferred.

But as in the German system the institution of a bench of justices proved impracticable for dealing with petty cases, so in England the experience was made in every generation, that the system of trial by both judge and jury was impracticable for the majority of petty criminal cases. The preceding period had as far as possible avoided any open deviation from it. The summary penal powers of the justices of the peace were in those days hidden under their extensive right of arrest until the next session, and other indirect measures, which in fact actually involved a penalty. With this period a power of summary conviction comes into direct prominence. Even in the above-mentioned groups of legislation numerous punishments before one or two justices of the peace are included, which, after the era of the Stuarts, increase to an almost unlimited extent.

3. Thirdly, the office of justice of the peace becomes the superintending magistrature over the newly formed parochial system, embracing the discretionary powers over the local police, the poor law, the highways, and local taxation. The local officers are under the specially regulated control of the justices of the peace, whose quarter sessions form a general court of appeal for complaints of the administration. The sessions of the justices of the peace acquire more and more completely the position of a district board, discharging by its orders a mass of administrative business, which, according to the various nature of the various objects, is sometimes committed to the quarter sessions, sometimes to a smaller committee, and sometimes to two, or even to one, justice of the peace. They appoint the staff of overseers of the poor, and now that the courts leet were in a state of decay, as a rule the constables of the parishes also. (3\*)

supremacy;" persons over sixteen years of age who keep away from church for longer than a month, or who dispute the royal supremacy, or attend conventicles, to be arrested by a justice of the peace, until they conform (35 Eliz. c. 4 sec. 1). "Maintaining the Pope's jurisdiction": punishment of *præmunire* 5 (Eliz. c. 1. secs. 2 and 15; 23 Eliz. c. 1, sec. 2). "Mass": the celebration or hearing of a mass to be

punished with two hundred [one hundred] marks and imprisonment for a year (23 Eliz. c. 1. sec. 4). The simple "not repairing to Church" without weighty excuse belongs to the cognizance of a single justice of the peace (23 Eliz. c. 1. sec. 5).

(3\*) The substructure of the pariah and its subordination to the justices of the peace and the central administration is described below in Chapter xxxvi.

14. 54.

All larger powers were altogether comprised in the periodically constituted commissions, which, after being again in the year 1590 revised by the courts of the realm, adopted the form which they have retained until this day. These commissions, analogous to those of the itinerant justices, establish by their uniformity a fixed constitution of the magisterial office, which, amidst all the vicissitudes of political tendencies, became an important guarantee. All the more necessary did the retention of the royal right of appointment appear, which was again, in 27 Henry VIII. c. 24, categorically insisted upon.

IV. The participation of the counties and municipal boroughs in assessing and raising the parliamentary taxes remains primarily unchanged. The internal independence and consolidation of the parochial life became materially enhanced owing to a new system of local taxation, which has now become the chief basis of the English parochial constitution, and to which, as being a permanent and principal creation of the royal ecclesiastical *regime*, we shall again refer at the close of the period (Chapter xxxvi.). We must point out here in anticipation thus much, that it was owing to the statutes of this age that the parish first became an independent and living member of the political system. As church and parsonage were the centre of the ecclesiastical parish, so also the poor-law and highway officers, and the poor rates and highway rates were the living bond that united parish and State together. The vestries with their rate meetings and elections of officers receive an impulse to reconstruct governing parochial committees and to independent activity in diverse directions. For the independent life of the small parishes the period of the Tudors is in a certain sense the normal era. (4)

V. Lastly, the municipal system of the borough, is a creation composed of these elements in which the more modern parochial system coincides with the older judicial and police system. In the municipal parishes the system of churchwardens, overseers of the poor and highways, and the rating connected therewith, was established just as in the rural parishes. But this new creation went its own way without any connection with the old borough government, which was

(4) Touching the development of the constitution of the parishes, see below, Chapter xxxvi. The characteristic features in this new creation are the local offices: churchwardens, overseers of the poor, overseers of the highways, and the old constables, who now form a system of personal activity, each mutually supplementing the other, in

the small parochial life. And then the system of communal taxation, the liability of all occupiers, without regard to freehold or copyhold, property, hire, or rent. The aggregate of the households became thus on this lowest step drawn in principle into the public life.

developed out of the court leet, and served for the judicial and police administration, for the office of justice of the peace and the constitution of the jury, as well as for the administration of the older landed property of the town. Through this separation the municipal *regime* became more and more isolated, and this isolation was particularly favourable to the continuous formation of smaller bodies. The court leet had, as a rule, little to do any longer; its current activity lay in the hands of the justices of the peace. For the administration of the old urban property there still existed a town council, etc., but this government was in most cities unimportant. This actual condition of things now became legally fixed by charters of incorporation. The newly granted charters of this period often put the municipal government and sometimes also the parliamentary franchise into the hands of committees or common councillors, who were appointed the first time by the Crown, and afterwards supply their number by co-optation. The election of the municipal officers is conducted by a smaller committee of capital burgesses, a governing body, or a select body, which fills up its number by co-optation. Where the charter does not sanction it, a right of this description can also be established by "statutes, prescription, or old custom." The evil result of this principle of incorporation was the arbitrary formation of the body of citizens, which excludes the burgesses who were entitled according to the old civic constitution, and in an equally arbitrary manner admits foreigners to honorary citizenship. Thus was the way prepared for that condition of things which, under the Stuarts, made the municipal corporations the principal theatre of party struggles and of violent encroachments of the government. (5)

(5) As to the constitution of boroughs, cf. Gneist, "*Gesch. d. Self-Government*," 318-325. There were at this time fifty-four charters of incorporation, forty-three charters of non-incorporation, granted to different towns. The basis of the "corporation" is not the whole civic community, but a smaller body, the election or co-optation of which is left to usage or especial provisions, and which obtains the rights of a *juristic persona*. We cannot as yet assume an intentional tendency to a malformation of civic constitutions. Nevertheless, a governmental system already appears, which, by means of the boroughs dependent on the Crown, endeavours to keep the Lower House in harmony with the political government; and for that purpose creates new boroughs, which were presumably

subservient to the Crown. The political government shows also an inclination to decide according to this view all doubts which arise with regard to the franchise. An opinion of the justices, rendered to the Privy Council in Michaelmas term, 40, 41, Elizabeth, was therefore important in its consequences, by which was declared the legality of select bodies, the powers of the same to make by-laws, the recognition of "long usage" in such matters, and the admissibility of an election of municipal officers by a committee or a common council. Contempt for the political importance of the inferior burgesses, over-estimation of the permanent influence of the Crown upon the small townships, but especially the adherence to old custom, were the reasons for allowing this state of things to continue.

Apart from this weak point the legislation of the Tudors shows in this province also a permanent gain. The new elements of the community combine with the already existing institutions for the maintenance of the peace, and form in combination an important member of the life of the community, and a primary basis of the State, to which I shall recur at the close of the period (Chapter xxxvi.).

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## CHAPTER XXXII.

### *The Progress of the Parliamentary Constitution.*

As the living roots of the free constitution live on in the parochial system, so their fusion in Parliament also continues. All that is changed is (as in the fifteenth century) attributable to a shifting of the factors of force, which, in consequence of the decay of the great nobles, and of the reformation and social conditions of the times tend now again to the advantage of the Crown. The "King in Parliament" of the sixteenth century resembles more the political system existing under Edward III., than the conditions as they existed under the house of Lancaster. The executive appears, as formerly, in the shape of a monarchy, surrounded by its more or less intimate counsellors, in the three customary gradations.

I. *The Continual Council*, now called *The Privy Council*, combines the Cabinet Council and Privy Council in one body, with the King for a personal president. The Privy Council is now again the seat of the actual government, the advising council of the King in the exercise of his prerogatives, formed according to his free choice, partly of spiritual and partly of temporal peers, partly of members of the Lower House, and partly of mere professional officials. The latter, as such, have indeed no longer a voice in the *Magnum Consilium* of the magnates; but the importance of the royal office had increased so much with the restoration of the monarchical form of government, that Henry VIII.'s rules of precedence give to the great officers, if they are also peers, precedence over the dukes. By the increase of power that accrued to the Crown as a consequence of the Reformation, the Privy Council attained such an enlarged sphere of action, that it

requires, as being the source of a new administrative law, a special description (Chapter xxxv.). (1)

II. The *Magnum Concilium* of the prelates and barons, the *Upper House*, has passed over into the epoch of the Tudors as an hereditary council of the realm. Henry VII. could only summon to his first Parliament twenty-nine temporal lords, and among them many recently ennobled. Others were later restored to their rank, and partly also to their estates, and until Elizabeth's death the temporal peers were moderately augmented, so that the number of earls had at one time been raised to nineteen, and that of the barons to forty-one. To these were added one, two, or three dukes, marquises, and viscounts respectively. The aggregate number of the newly created peerages, as well as of those advanced in rank, is given as follows:—under Henry VII., twenty; under Henry VIII., sixty-six; under Edward VI., twenty-two; under Mary, nine; and under Elizabeth, twenty-nine. The Tudors restrict their creations, with scarcely an exception, to the old knightly families. Only once did the aggregate of the temporal peers under the Tudors reach the number of sixty. The alteration in the state of things was here most apparent owing to the disappearance of the organized military forces of the great barons. The Upper House had thus in a certain sense returned to the conditions existing in the fourteenth century. The centre of the State lies again in the Privy Council, and the influence of the peers principally in their being called to fill the chief offices of State. It was in this brilliant nobility, that had now become recognized as hereditary, as well as in the bishops, who could be deposed at will, that the requisite majorities were found for the violent deeds of Henry VIII., as well as for the changes of religion of Henry, Edward, the

(1) The members of the council belong to Parliament partly as being peers, partly as deliberating members of the Upper House, and partly as elected members of the Lower House. The justices of the realm, the attorneys-general, and others are now only summoned as legal advisers of the Upper House with the customary writ "*ad tractandum nobiscum et cum cæteris de consilio nostro*;" whilst the writ of summons of the peers ran "*ad tractandum nobiscum et cum cæteris Prælati, Magnatibus, et Proceribus*." Their names were in the writs always placed after those of the peers. In the statute of precedence (31 Henry VIII. c. 14), a separate place was assigned to them in the Upper House outside the ranks of the voting peers. The members of the

Lower House, who are honoured with an office in the Privy Council, take on the other hand a distinguished position, and are frequently, as a smaller committee, entrusted with the decision of important political questions. In 35 Elizabeth, on the 10th April, 1593, the Queen expresses her displeasure on account of "irreverence towards the members of the Privy Council who are to be considered as her 'standing councillors' in contradistinction to the temporary members of Parliament" (Parry, 234). In 6 Mary, the Lord Chancellor appeared with other lords in the Lower House, and took his seat in the place set apart for privy councillors; whereupon the Speaker left his chair and took his place with the privy councillors (Parry, 213).

Catholic Mary, and the Protestant Elizabeth. A permanent influence was exercised also upon it by the Reformation, which caused the disappearance of a fixed number of twenty-six regularly summoned abbots and two priors. In the Parliament of the 13th April, 1539, only twenty spiritual peers appear, as against forty-one temporal; but both sides are affected by the same spirit, which on the Continent made the nobility subservient, by attracting it to the Court, and by preferring it to the great offices. For more than a century the nobility ceases to represent the rights of the nation. Influence and pre-eminence in all that had a charm in those days, was now dependent upon the royal favour, to gain which the old families vied with the newly created favourites. (2)

III. *The Composition of the Lower House* was but little changed in the transition from the Middle Ages to the age of the Tudors. Certain extensions were made by the fact that under Henry VIII. 27 members of Parliament for Wales were added, as well as seven members for the county palatine and the city of Chester, which had now become incorporated with the parliamentary constitution. Still more owing to the fact that a number of older boroughs were restored, and other new ones summoned; under Edward VI., 22; under Mary, 14; under Elizabeth, 62 fresh members. The increase and the constitution of the body down to the close of the period is discernible in the parliamentary writs at James I.'s accession, to whose first Parliament 467 members were summoned; among them 231 knights, 140 esquires, 71 gentlemen, nine merchants, one mayor, nine aldermen, four doctors of law, and

(2) The spiritual peerage is restricted, since the abolition of the monasteries, to the archbishops and bishops. The abbots sat for the last time in the Upper House on the 28th June, 1539 (31 Henry VIII.). The Abbot of Westminster, who, under Mary, was alone reinstated, sat at the beginning of Elizabeth's reign for one day in Parliament, that is, on the 8th May, 1559. The Act of Uniformity (1 Elizabeth, c. 2) was passed in spite of the opposition of all the bishops, for which reason the spiritual lords were passed over in silence in the preamble to the statute. As early as 7 Henry VII., the justices had declared that the King might hold a Parliament without all the spiritual lords (Coke, Inst., ii. 585-587). With regard to the personal position of the temporal peers, it is worthy of note that Henry VIII.'s harshness displayed itself pre-eminently upon the favourites he had himself raised up, whilst other-

wise he proved himself to his temporal peers (many of the younger of whom had been his feudal wards) a benevolent, generous, and obliging lord. But the breach in the position of the old ruling class is nowhere more clearly visible than in the fact that the right of a peer's jurisdiction, which had been with difficulty attained, had become almost a *privilegium odiosum*. The ordinary procedure by impeachment makes way for the *bills of attainder* by which the King causes his fallen favourites to be condemned in legal form. Placed in an intermediate position between the royal will and a consenting majority of the Commons, the hereditary council of the Crown dares to offer no more opposition. With regard to the competence of the Upper House, its position as a Court of Appeal, on a writ of error, although fallen into comparative disuse, was expressly confirmed by 27 Elizabeth, c. 8.

one serjeant of law. In spite of the growing power of the royal prerogative, the *communes* feel themselves, in the face of the ever-increasing money demands, upon firmer ground than the temporal and spiritual peers. The whole weight of the public activity of the landed interests and their influence in the parliamentary elections, falls upon the military and police administration. The influential participation in the affairs of State is now accordingly centred in the commissions of the peace. At the head of the commission there regularly stood as *custos rotulorum* (at the same time generally in the capacity of lord lieutenant of the militia), a temporal lord of Parliament, with a large number of "gentlemen."

This "gentry," as each generation passed by, widened its circle, in proportion as property and the public position upon which it was based became more extended. In another direction the number of freeholders increased in consequence of the secularization of the monasteries, the divisibility of landed estates, and the freedom of devise by will after Henry VIII. Still more had the improving agriculture and trade in those towns that had become wealthy, increased the ground rent of the smaller ones. The middle classes in the towns increased by the rise of trade and commerce, favoured by the care taken of guilds, labourers' unions, and companies, and by the provision made for assuring to them a certain livelihood and fair trade. An indirect recognition of the importance of the Lower House is shown also by the fact that, in important crises, the Tudors begin to exercise a personal influence upon the elections. An innovation of the times has been introduced in the election of the Speaker, who is now appointed, as a rule, by the King, and accepted by the consent of the House, in order, it is alleged, to avoid loss of time in disputing (Coke, *Inst.*, iv. p. 8). Repugnant as was the enhanced position of the Lower House to the statesmen and ecclesiastics of the age, yet the Tudors, in the few cases of any serious collision, yielded in this direction, and particularly in the voting of money, and the question of monopolies. It did not escape their comprehension that the local unions gained an increasing independence by reason of their self-activity and money-voting powers, and that the royal government must find its strength by being in accordance with the national spirit and with the right needs of the country. (3)

(3) In the Reformation Parliament of Henry VIII., there sat 298 members. On important occasions of this kind the Tudors did not scruple to exercise their personal influence upon the election. In 7 Edward VI., the sheriffs of the various counties were even com-

missioned to return certain persons who had been designated by the King. In 2 Mary, the order to the sheriffs was that they should return from the counties and towns, men "of the wise, grave, and Catholic sort." The number of Court officials and such like depen-

This position of the King in Parliament is proved also in detail, when the three fundamental provinces of Parliament, viz. *legislation, taxation, and administrative control* are examined.

1. *The legislation by Parliament*, under Henry VII., began, which recognized the title to the throne, or rather re-created it. The succession of all five monarchs of the house of Tudor was based upon parliamentary statutes. The work of reformation was, in all its most important details, brought about by the resolutions of the Parliament convened on the 3rd of November, 1529, and, in fact, principally by motions of the Lower House; the whole of the later acts of *supremacy and uniformity* are likewise due to parliamentary legislation. The dynasty could just as little dispense with the full co-operation of Parliament for its work of reformation, as the ruling princes of Germany could with their *Landstände*. The century of the Tudors is more parliamentary than any preceding one, in so far as no Parliament ever had more important problems to solve, especially in regard to ecclesiastical affairs. It was now the established legal opinion that the estates were only *permanently* bound by *what* they had joined in enacting. Still more firmly rooted was the idea that what had once become law by the joint action of the three estates, could only be again altered with their consent. All important measures in Church and State were thus brought into the sphere of parliamentary legislation. Bills which were initiated by the Crown were indeed accepted as a rule. When, however, in 1592, the Lower House on one occasion rejected a bill, Henry VIII. surlily submitted, but without further attempts. Several instances of the kind follow under Edward, Mary, and Elizabeth. The statute 31 Henry VIII. c. 8, certainly contained a far extending recognition of the legal sanction of royal ordinances; but its declared intent was only the maintenance of certain rules in religious matters. That no further meaning

dent persons was also under Elizabeth a considerable one. Her influential ministers, such as Hatton, Knollys, and Robert Cecil, not only sat in the House, but also took a lively share in the debates. These members were able with the greater ease to gain an influence, as the sittings of the House were not very numerously attended. Even in important debates at most 200 to 250 were usually present. A list of the boroughs represented in parliament since 1 Henry VIII. is given in the "Parl. History," vol. vi. The regular leadership, which the knights of the shires had taken upon them-

selves in the Lower House in the fifteenth century, has now ceased, in consequence of the dictatorial position of the monarchy. With the abatement of party struggles, the municipal members appear all the more as representatives of material and local interests. It is, however, a symptom of a growing political influence, that we now frequently find strangers to the city canvassing for municipal parliamentary seats, in all which cases, the limitation of the legal eligibility was easily evaded by a grant of the freedom of the borough.



lay concealed, is shown by the proviso, "that no one be injured in real estate, in liberty, or in person, nor the laws and customs of the realm subverted thereby." Moreover, this statute was repealed with all haste in 1 Edward VI. Elizabeth issued more numerous ordinances, but their constitutional validity must be determined according to the customary principle of a concurrent legislative power. There is nothing to be seen of any tendency to evade Parliament by ordinances. Mary herself indignantly cast into the fire a servile book advocating this practice. When in 14 Elizabeth a bill touching the rites and ceremonies of the Church had been read a third time, the Queen declared to the House, through the Speaker, that "No bills concerning religion shall be proposed or received into this House, unless the same be first considered and approved by the clergy." This, however, referred to the initiative of the legislature touching the internal affairs of the Church, and actually formed a new province, as to which no precedent could be found for the co-operation of Parliament. On the contrary, the interference of the Commons with the internal administration of the Church, as well as all taxation of spiritualities, had been always energetically rejected. According to the constitutional precedents of older times, Elizabeth's ordinances (*vide supra*, p. 468) can be proved to be constitutional. Never has any change in the customary civil or criminal law by means of ordinances been mooted. Many of them are based upon express authorization by previous statutes; others, again, upon their ecclesiastical power, such as the ordinance against the conventicles (prophesyings), and the decrees of the censorship of the press; others upon feudal and military prerogative, as the ordinance concerning the length of swords, the prohibition of the export of provisions to the enemy. Elizabeth, indeed, on principle, asserted her right to make laws in the new province of religious affairs, without the aid of Parliament; but at last, though with many assurances that it was unnecessary, she caused even the Thirty-nine Articles to be sanctioned by Parliament. (a)

(a) The parliamentary legislation was inaugurated by the Act of Parliament at the accession of Henry VII., declaring that the hereditary possession of the Crown of England shall be, stay, and remain in Henry and the heirs of his body. In the Pope's letter there was added, "*Neo non Decreto Statuto et Ordinatione ipsius Anglie Regni trium Statutum, in ipso conventu Parlamento nuncupato.*" The holding of Parliaments was, according

to former custom, left to the discretion of the Crown; frequently it was suspended for a number of years. But, on the other hand, it became ever more frequently the custom to prorogue the sessions of the Parliament, when once convened, to the following year. Only with the Reformation Parliament did an inclination of both Houses arise to delegate to the King extraordinary powers and even legislation itself. The Reformation Parliament declared with-

2. The right of *voting money supplies* is also undisputed. The seven Parliaments of Henry VII. and the first five Parliaments of Henry VIII. had the voting of subsidies for their chief object. After Henry VI. the tonnage and poundage had been granted to the King for his life, and the hereditary revenue so far strengthened as to allow of the current needs of the executive being more easily covered without subsidies. Moreover, the right of the estates of the realm to vote supplies had been for two whole centuries so firmly established that the first attempts at arbitrary power of Henry VII. and Henry VIII. conjured up a dangerous resistance. The Parliaments of Henry VIII. showed themselves in the main so compliant, that this King is said to have raised more subsidies than all his predecessors together. Prompted by the feeling that the King required great means for great objects, later on most extraordinary supplies were voted, though not indeed quite as much as Henry demanded. When Parliament did not directly grant more, it indirectly allowed an abuse of administrative power to be put in force against individuals, by so-called "benevolences," which were impressed upon capitalists by the council, by special commissioners, and by enforced service in the militia. This species of compulsory loans (with or without definite prospects of repayment), which was introduced under Edward IV., had been expressly disavowed under Richard III.; but the statute was not respected, as being a measure of an usurper, as was afterwards expressly explained by Cardinal Wolsey to the people of London, in 7 Henry VII., with the indirect sanction of Parliament, this abuse was revived, and from this time onward, it repeatedly recurred (particularly in the years 1495, 1505, 1525, and 1544). As early as the reign of Henry VII. Archbishop Morton had discovered the clever principle of taxation, which received the name of "Morton's Fork." He told those who lived handsomely, that their wealth was proved by their expenditure; and those who lived penuriously, that their parsimony must have made them rich. The attempt made in the year 1525 caused, however, a dangerous insurrection, to which Henry VIII. yielded. These forced loans never became effectual except through the direct or indirect sanction of Parliament. It was an intentionally tolerated abuse, the motive for which was the avoidance of a grant of subsidy. Elizabeth once refused a forced loan of this description, on

out scruple: "Your high Court of Parliament has full power and authority, not merely to dispense, but also to authorize a certain person or persons to dispense from these and all other human laws of this your Kingdom"

(Amos on the Reformation, Parl., 65; cf. 25 Hen. VIII. c. 237). The far-reaching *Statute of Prerogative*, 31 Henry VIII. c. 8 (Froude, iii. 200), was, however, repealed on Edward VI.'s accession to the throne.

its being offered by Parliament, and showed herself in all cases, when she of her own accord adopted them, conscientious with regard to repayment; on these occasions she sometimes gave the honour of knighthood and friendly words instead of interest. On one occasion she had imposed a duty upon sweet wine, on another she had raised a tax from the clergy without the consent of Convocation; but in principle the right of taxation remained during the whole of this period fully recognized. (b)

3. The *control of the administration* by Parliament was finally guaranteed by the right of voting supplies, and participation in the legislation. It was also at times exercised in national complaints touching financial and other administrative abuses, and, after the Reformation, by religious complaints in one direction or another. This activity was, however, from the first pre-eminently dependent upon conditions of power, the state of public opinion, and interests. As in the preceding century it had frequently exceeded all bounds, so now it frequently failed to enforce its just claims, though here will rather than power was lacking. As the Upper House in its condemnation of unpopular favourites, so the Lower House in furthering enforced loans and in punishing disrespectful opposition, sometimes showed itself more monarchical than the King himself. This overpowering

(b) The money grants of Parliament had become, with the decay of the hereditary revenue of the Crown, the principal reason for the dependence of the Crown upon the Lower House. To a certain extent the deficiency was made good by the tonnage and poundage for life, which was retained, as a rule, on the accession of the five monarchs of this dynasty. Henry VII. had thereby, and by his financial extortions, made himself far more independent of Parliament than his predecessors (Peers' Report, i. 372); in all the seven Parliaments of Henry VII. subsidies were, however, granted. Much more abundantly did the grants flow in under Henry VIII., and as a rule in the customary method, that the Commons grant "with the consent of the Lords," and the clergy in Convocation grants for itself, but its grants are confirmed by Parliament—a rule which was also repeated after the ecclesiastical restoration in 5 Mary. When, in 14 Henry VIII., Cardinal Wolsey appeared in great pomp, to move for a subsidy, he was obliged to accept the Speaker's answer, "that his coming thither was neither expedient nor

agreeable to the ancient liberties of that House." A power on the part of the Lords to amend the money bill was recognized in so far as that in 1 Elizabeth the Lower House accepted an amendment of the Lords. In 27 Elizabeth the Commons grant two-fifteenths and two-tenths, but the Lords strike out one-tenth, with which emendation the grant passes. In spite of all economy, there were under Elizabeth in the course of 11 parliamentary sittings, 19 subsidies, and 38 fifteenths voted, and, in 44 Elizabeth, actually four subsidies and eight fifteenths on one single occasion. Even in the time of the greatest loyalty, the Speaker of the Lower House, Onslow (who was at the same time Solicitor-General), says, in an address to Elizabeth: "Our common law, although there be for the Prince provided many princely prerogatives and royalties, yet is not such as the prince can take money or other things, or do as he will at his own pleasure without order, but quietly to suffer his subjects to enjoy their own without wrongful oppression; wherein other princes by their liberty do take as pleaseth them."

influence of the social interests and opinions of the time has become intelligible by experience to the nineteenth century. Under the Tudors it had exactly reversed the meaning of parliamentary impeachments. Instead of guarding the constitution as a whole from violation, and preventing abuses of the executive power against individuals by its penal powers, the Parliaments had become so subservient in their penal functions that under Henry VIII. a dictatorially selfish wilfulness, under Edward VI. party-passions, and under Mary religious fanaticism had no surer mode of striking their opponents than by the resolutions of Parliament. The morality of the times scarcely considered the wrong to an individual as a public evil. The bloodthirsty violence of Henry VIII. was vented upon the immediate surroundings of the throne, upon a nobility he had himself raised up, which condemned its own peers, well knowing that new gifts followed upon confiscations. But the mass of the people sought and found in the Tudors the furtherance of their interests by the administration, and the satisfaction of their national pride by the Reformation. And herein we must also notice that the debates of the House were not carried on in public, and, in consequence of the then existing censorial regulations, and the want of a periodical press, were but little known, and accordingly only found support outside the House when opposition allied itself with a strong and universal public opinion. But in all questions involving principles, as also in all material questions, such as taxes and monopolies, the opposition shows itself obstinate enough. The rule of the Tudors, out of regard to this state of things, treated the commoners after its own fashion. A good understanding with them, yet hand-in-hand with crying wrong done individuals, pervades the whole period. An incident which occurred in 44 Elizabeth is characteristic. The Queen, after a debate of six days, abolished a severe abuse, the grant of monopolies, in dignified and queenly language, and received the thanks of the House in return. (c)

(c) The control of the Government is, except in one point, scarcely different from that of former epochs. This is the disappearance of the impeachments of ministers of the Crown by the Lower House. The penal procedure of Parliament appears rather as a political measure for the removal of persons of high distinction in the form of an enactment. Its legal validity was modestly questioned by the justices in 31 Henry VIII., who held that it was a new and dangerous question; equity, justice, and law demanded that the

accused be heard; as, however, Parliament was the highest tribunal in the land, from which there was no appeal, the validity of its judgments, of whatever kind they might be, could not be called in question.

But the reproach of compliant weakness is more applicable to the nobles than the commoners, and particularly to the old houses, the Norfolks, Arundels, Shrewsburys, quite as much as to the newly elevated Cromwells, Riches, Russells, Powlets, Pagets, etc. (Hallam, "Const. Hist." i. c. 2). The

The exercise of parliamentary privileges shows accordingly in this period many sides, which would appear inexplicable unless due regard were paid to the religious controversies and to the character of this society that was in a process of reconstruction. But the parliamentary constitution existed, and there was on the part of the Tudors neither a serious intention of abolishing it, nor on the part of their Parliaments an idea of permanently renouncing any portion of it. The notion that the Tudor form of government was in principle an absolute one has been in modern times principally propagated by Hume's partial history, and is now acknowledged to be erroneous. The attitude of the Tudors towards the personal rights (liberties) of members of Parliament is a characteristic incident, and helpful to the comprehension of the parliamentary constitution. In 4 Henry VII. the error for the first time occurred that a local court passed a penal sentence upon Strode, a member of the Lower House, on account of bills which he had introduced. Upon motion of the Commons, the unanimous declaration of both Houses and the King ("*Statutes of the Realm*," iii. p. 53) was issued, which declared that judicial proceeding null and void (May, "*Parl. Practice*," i. c. 4). In 35 Henry VIII. the first case occurs in which the House summons the sheriffs of London before its bar for arresting a member, and commits them to prison, which proceeding was confirmed in the most emphatic manner by the King (Hatsell, "*Precedents*," i. p. 53). Similarly, in 35 Henry VIII., the privilege of the House was acknowledged in the face of an order of arrest issued by the council (Nicolas, "*Proceedings*," vii. 306). In 2 Mary an indictment was attempted in the King's Bench of those members who had, in consequence of the proceedings touching the question of religion, quitted the House without permission; but this case never came to an issue ("*Parl. Hist.*," iii. 312-335). The attempt to exclude a member of the Lower House from the sittings by royal order (1571) was given up. The issue of these conflicts resulted finally in favour of the Lower House.

political courage too of the higher clergy seems to have been buried with Thomas More and Fisher. The Upper House contains a nobility in a new position, which only in later generations regains its old feeling and character. Beside the servility of the Upper House, the Commons still betray symptoms of independent views. Their

pompous and servile language belongs to the style of the time; their yielding temper on the occasion of forced loans (Stubbs, iii. 276, *seq.*) and their high-handed acts against individuals are a sign of the egoism of the times. Their submissiveness in religious questions is a national sympathy for the national Church.

## CHAPTER XXXIII.

*The Reformation.\**

Now that a generation had passed away since the Wars of the Roses, and a new one had grown up under the orderly discipline of the State, the time at last drew nigh for resuming the work of ecclesiastical reform, which had been interrupted in the fifteenth century.

It is difficult for us to realize that period of the Middle Ages in which the Church is the representative at once of politics, legal knowledge, diplomacy, education, literature, and much more besides; a period in which the clergy were not only father confessors, but belonged to the State as chancellors, treasurers, ambassadors, justices, clerks of the court, barristers, attornies, physicians, accountants, and secretaries; and as such, therefore combined in one great class, rendered exclusive by celibacy, the whole of the rights which resided in all branches of intellectual labour, whether official or not. From this fusion of the intellectual and moral life of the nations into one institution arose property, magisterial control, and the power of the Church, and it grew up into that universal State of the Middle Ages, which attained the outward zenith of its power at the commencement of the preceding period. Since then a state of tension had by degrees come about, in which the Church had, to the bulk of the people, become a mere outward institution, and to the upper

\* For the history of the Reformation, the one-sided but authentic "History of the Reformation," by Burnet (1681, 3 vols. fol.), is still of the greatest value. In modern times: Vaughan, "Revolutions in English History," ii., "Revolutions in Religion" (1861); A. Amos, "Observations on the Statutes of the Reformation Parliament in the Reign of King Henry VIII." (London, 1859). Among the numerous modern supplementary works may be especially mentioned: J. Galt, "Life of Cardinal Wolsey" (1846). For the times of the Puritans: Samuel Hopkins, "The Puritans in the Church, Court, and Parliament during the reigns of Edward

VI. and Elizabeth" (New York, 1859); J. B. Marsden, "The History of the Early Puritans," and "The History of the Later Puritans." But above all, J. A. Froude, "History of England from the Fall of Wolsey to the Defeat of the Spanish Armada," vols. i.-xii., hereafter quoted from the edition of 1870-1877. Out of the copious matter contained in the latter work I may here especially draw attention to the proceedings against Queen Anne Boleyn, vol. ii. c. 2. and App.; the characteristics of Henry VIII., vol. iv. c. 24; the action against Mary Stuart, vol. xii. c. 69.

classes in many respects an object of aversion, and in which the old rights of the Church had already become jealously regarded privileges. The beautiful office of mediator, which in the Anglo-Norman period, and in the great crisis of Magna Charta, had been undertaken by the English prelates, had all but passed out of mind. The high ecclesiastics had been for a long time past no longer mediators, but rival candidates for political power. In the Wars of the Roses they had proved themselves to be a body devoid of moral influence. After ecclesiastical property had, by the Church's own fault, been diverted from its original purpose, the Church still claimed (though now with inadequate means) the fulfilment of the humanitarian duties of the State as her own monopoly; whereas the laity had now the judgment, the will, and the means of fulfilling such duties itself. After the causes had gradually disappeared which had induced the clergy to emancipate themselves from the magisterial power of the laity, so as not to degenerate into the disunion and barbarity of the feudal state, the Church insisted with all the more zeal upon her exemption, as being a class right and privilege; and this, owing to the over-indulgence of the spiritual courts, led, in the shape of "benefit of clergy," to the exemption from punishment of ecclesiastics, even for notorious crimes and immoral conduct. Now that the close of the Middle Ages had opened to the European populations new domains both in the physical and in the intellectual world, now that the thoughtful spirits of the age had become involved in a movement such as had been hitherto unheard of, the Church demanded that intellectual life should stand still, because her leading functionaries could not and would not keep pace with its progress. Although her intellectual and moral foundations had been shaken to their lowest depths, the Church still remained in possession of all the estates and rights of power which ever remain for some time in a human community after the moral justification for their possession has disappeared. This is that eternal contradiction out of which the great reformatory tasks of the State proceed. This contradiction now took possession of the whole of the Catholic world, and, by the complete alienation of the Roman Church, implicated the papal chair in the network of intrigues and struggles of the European great powers, abolished the former solidarity of Catholicism against the propagation of heresies, and thus everywhere opened a freer scope for the aims of Reformation.

In these struggles of the Reformation a dual movement is to be distinguished. The first is the fight made by liberty of thought and conscience against the Roman intellectual tyranny, a fight waged by certain bold thinkers and a small

portion of the clergy and laity, who are urged on by the deep conviction, gathered from the Holy Scriptures, that essential portions of the Roman Catholic dogmas and doctrines were the work of man, and inventions for enhancing ecclesiastical supremacy. The second movement is the striving after national independence against the Italian suzerain, and this is supported by the great majority of the people. This second tendency is, in England, by far the preponderating one. After the classes of society were united in the Upper and Lower Houses under the Plantagenets, after the nation had learnt to feel itself a unity, the insular popular aversion to the Roman primate also returned. It is at first the sense of national exclusiveness and independence which revolts against the universal ecclesiastical State. Whilst the German Reformation is primarily the outcome of an intellectual movement, and of the deep conviction of the errors of Catholic doctrines, and only in a secondary manner reflects upon the State; the English is at its very outset a national political act which only after the lapse of generations deepens into an intellectual movement among the mass of the people. It is, therefore, at its outset "more practical," that is, "more external." As the Roman Church had become secularized in fixedness of property and political institutions, so also it was attacked upon this external ground, in its possessions and in its suzerain; the casting off of the suzerainty of the Roman bishop is the first aim.

Henry VIII. had been personally trained up in Catholic doctrines. He had in person taken part in the dogmatic controversy of the times, by his treatise against Luther earned the honorary title of "Defender of the Faith," and had even himself zealously caused the persecution of heretics; but yet in the coronation oath, touching the constitution of the Church, he had with his own hand made the correction: "*nott pre-judiceall to hys jurisdyction and dignity royall*" (Ellis's letters). In the part he took in European intrigues he had always dealt with the papal *curia* upon the same terms as with other great powers, and had gained sufficient experience of its friendship and enmity not to over- or under-estimate it. But his divorce proceedings had brought him into complications out of which there was at last no other way of escape than by breaking with the external authority of the Bishop of Rome. In this state of affairs the King could not rely upon the doctrines of individual reformers, but only upon the great tide of national opinion, upon the insufficiently educated but influential parochial clergy, and upon the mass of the people. Their sympathies everywhere accorded with his political tendencies and his personal wishes, and afforded him a support similar to that which in former times the House of Commons



had afforded to the Plantagenets against the barons. Yet even with these sympathies in his favour the revolt against the universal power of the Church was still a daring step. It was the renouncing of obedience to the highest legitimate power, a breaking with the whole system of authority of the Middle Ages. But the boldness and acumen with which Henry VIII. carried out the scheme upon which he had resolved, gives his ruthless and violent personality a providential significance for England.

Whilst it disclaimed all connection with the Lutheran and reformed doctrines of the Continent, the new legislation was ushered in by universally popular measures, by the abolition of ecclesiastical dues and some administrative abuses.\*\*

The first decisive step is the complete separation and emancipation of the ecclesiastical bureaucracy from Rome, a re-enforcement of the "*præmunire*," and strict prohibition of every appeal to the *curia*, "in consideration that the Kings of England have never had any other superior but God alone." The papal right of dispensation was transferred to the primate, the sale of indulgences forbidden, papal indulgences declared null and void, the grant of the pallium freed from all influence of the *curia*, every doctor of Roman law, be he cleric or layman, declared capable of exercising the magisterial rights of the Church (as vicar-general, chancellor, or justice). The King again exclusively assumes the right of appointing the bishops. The whole body of the clergy is immediately subjected to the civil jurisdiction and to all the coercive measures of the executive.

The second decisive step is the secularization of the ecclesiastical property by dissolution of the monasteries. They were until then in alleged possession of one-fifth of the land in the realm, and possessed a revenue about three times as large as the ordinary receipts of the Crown, an income very unequally distributed amongst from four hundred to five hundred institutions. The idleness, licentiousness, and immorality of the monks were notorious, yet the King considered a formal agitation necessary to reconcile the nation to this violent attack upon the existing legal estates. The Crown acquired by this means £500,000 personal property, and at least £181,000 annual rents from real estate; according to other estimates, three, four, or even ten times as much. This mass of wealth was partly expended for immediate war purposes, partly granted to the nobles and gentry with royal profuse-ness, partly parcelled out on State account, partly employed for the fortification of the country and for improvements, and

\*\* As to the epochs of the Reformation, cf. the excursus at the end of the Chapter.

for the endowment of new bishoprics. Thus were the estates of the noblest families in the land at once made dependent upon the legality of the Reformation, and the former majority of the spiritual peers in the Upper House was changed into a minority by the deposition of the abbots and priors.

Partly simultaneously and partly subsequently there were added to these concrete measures, which were directed against the external ecclesiastical state, the comprehensive and formal declaration of the "royal supremacy." In 25 Henry VIII. it had already been declared that Convocation should issue no new canons without the royal consent, nor execute such without the royal *placet*. By the formal declaration of supremacy, however, the King now, as successor to the papal power, takes up the ground of divine appointment with equal legitimacy, and with it continues the ecclesiastical constitution as it had hitherto existed, as well as its legal protection by capital punishments for *hæresis*, *apostasia*, *schisma*, as a portion of the royal prerogative. After a single attempt at applying to the denial of supremacy the punishments inflicted in the Middle Ages upon heretics, Henry VIII. does not scruple to apply the capital punishments for high treason to the violation of these new prerogatives of the monarchy.

Up to this point the Reformation had only been external, without any separation from the Roman *dogma*. This is the very point at which the external character of the movement appears most outrageous. Whilst Henry revolutionized ecclesiastical property and constitution, *dogma* is only incidentally mentioned. Parliament had certainly empowered him to appoint a commission "to agree upon a new form of the national religion." But the work was only begun in a hesitating and vacillating way, and it was hardly known how to set up any new matter. Gardiner's Six Articles still teach the doctrine of transubstantiation, refuse the cup to the laity, retain auricular confession, Masses for the dead, and celibacy, and confine the reading of the Bible to persons of rank. Whilst on the Continent streams of blood flowed on account of the creeds of the Church, political negotiations are here begun for the adaptation of a "national" doctrine of faith, in the course of which Henry dies.

What was most unintelligible to the Continent, and was at times an object of aversion, was the manner of carrying out this royal reformation. It was not so much the rule of passion or caprice of a despot, but it was Richelieu's system anticipated, which, in accordance with a well-considered State plan, always crushed the head of opposition at once, in order to prevent "contagion." In the first stage of the Reformation, after formal proceedings and deliberations in

the Privy Council, it was determined to hang the prior and three monks of the Charterhouse in their canonicals, *coram populo*; and the clergy at once submitted. In a second stage the executioner's axe again falls on the heads of the opposition (the Chancellor Thomas More and Bishop Fisher). In the later stages, from time to time, single executions in special provincial places are determined on. The execution also of two queens, which was indirectly connected with the Reformation, took place with the strict ceremony of a judicial trial and judgment. It is in like manner State policy which sacrificed the most faithful and most successful servant of the King, Lord Thomas Cromwell, to the passionate hatred of the high clergy and magnates. State policy actually succeeded in localizing the civil wars which followed the Reformation, and in easily suppressing them, though at the expense of violating the highest principles of Christian morality, for which retribution follows.

The Reformation was only fully carried out by the regency under the name of Edward VI., as well in dogma as in Church ceremonies and the liturgy, in the abolition of celibacy, and in the general licence to read the Bible. This Protestant reform was the work of Cranmer and other men of true religious convictions. But the opinion of the nation was still divided. The religious confusion caused party spirit and dissatisfaction, distress and social differences throughout the country, with which the regent, the Duke of Somerset, was not strong enough to cope. Once more, with the government of a protector, the rule of the nobles revived, which pressed with heavy hand upon *villeins* and the labouring classes, and which, amid famine and pestilence, financial distress and debasing of the coinage, squandered the resources of the State, and raised the expenditure of the Court from £14,000 to £100,000, dissipating Crown lands to the value of £1,500,000 in the form of grants of favours, sales, and exchanges to the enrichment of the ministers and their friends. In this position the weak regency succumbed to the ambitious intrigues of the Duke of Northumberland, who, in the confusion of the times, even endeavoured to secure the succession to the throne in favour of his family.

Seldom has any reformation been apparently more quickly suppressed than this English Reformation under the Catholic Mary. Once again it is State policy to which the higher intentions of the Ecclesiastical Reformation are sacrificed. It was not merely the popularity of the legitimate daughter of Henry VIII. which gained the rapid victory over the rival Queen, Jane Grey, but it was the threatened danger of a return of dynastic struggles, which rendered both Parliament and

nation subservient to the will of the Catholic monarch and ready to sacrifice all else to the temporal interests. The abolition of the royal supremacy, the re-introduction of celibacy and the Mass, passed easily through Parliament; indeed, through the Upper House without any opposition. One thousand five hundred (according to others, 3000) clergymen were driven out of their places; 284 persons were burnt, among them Archbishop Cranmer, four bishops, eight gentlemen, sixty women and children. Mary might have made any demands but one—the restitution of the ecclesiastical estates.

The reign of "bloody Mary" is, however, only a short interruption of the Tudor system. In her successor, Elizabeth, the glory of the English monarchy becomes once more concentrated. The true nature of the Roman Church had displayed itself to the nation in its most repulsive form. Chastened by severe trials, strengthened by faith, enlightened by examination of the Holy Scriptures (now no longer closed to the people), the Protestant religion now strikes its root firmly into the hearts of the people, attains by a careful revision of the Prayer-book, the Liturgy, and the ritual, a form sympathetic and intelligible to the great majority of the English people, and thus renders possible the re-establishment of a united Church in a united nation. By the Act of Supremacy (1 Elizabeth, c. 1) and the Act of Uniformity (1 Elizabeth, c. 3), Elizabeth, as ruler of the Church, declares the Protestant Church to be the State Church "as by law established;" and the whole population as lawfully belonging to the State Church. Every cleric, every Englishman in any public office, and on entering the House of Commons, has to take the Oath of Supremacy. The Thirty-Nine Articles were also subsequently confirmed by Parliament. The later statutes of Elizabeth appear only as supplementary to these—5 Elizabeth, c. 1, for assurance of the Queen's royal power, all estates and subjects; 18 Elizabeth, c. 1, against bulls from Rome; 18 Elizabeth, c. 12, for ministers of the Church to be of sound religion; 23 Elizabeth, c. 1, against Mass; 27 Elizabeth, c. 2, for the departure of Jesuits and priests; 35 Elizabeth, c. 1, against sectaries; 35 Elizabeth, c. 2, against popish recusants. Thus has the English State Church become established, independently opposed to the Roman Ecclesiastical State, subordinate to both King and Parliament, and incorporated into the civil community. The royal supremacy has become a necessary presupposition of the present political system, with all its consequences for the external life. Not until this Act has been passed do we find the monarchy upon the pinnacle of its power under the long and glorious reign of the Virgin Queen.

NOTE TO CHAPTER XXXIII.—*The Epochs of the Reformation* may be divided in the following manner:—

1. The national Church of Henry VIII. appears as a continuation of the external policy of the first twenty years of his reign. Henry had by predilection and with tolerable success mixed in the complications of the European cabinets of his time. He had found for such purposes, in Cardinal Wolsey, a versatile minister, who was a match for the statesmen of the Continent, and perhaps more than their equal in duplicity. But the proceedings relating to the royal divorce had become at last irretrievably entangled in the dynastic and political complications of the Continent, as the King acknowledges after his own fashion by abandoning Wolsey. Immediately after the overthrow of his master, and with the latter's consent, a hitherto subordinate servant of Wolsey begged and obtained an audience of the King. The object was doubtless the suggestion that the King might save his honour and his independence by assigning his matrimonial question to the authorities within his own realm, by renouncing the supremacy of the Bishop of Rome, and by a reassumption of the royal powers almost to the extent in which they had existed down to Magna Charta; in fulfilment also of the national wishes and aims of the Commons, as they had been plainly enough declared in the fourteenth and fifteenth centuries. The modest, clever, and determined councillor, for the realization of such plans, appears after a few months in the King's council, after a few years as Lord Thomas Cromwell (ultimately Earl of Essex), at the head of the Government, as the author and leader of the connected chain of parliamentary statutes, ordinances, and measures. The so-called Reformation Parliament, which was convened to carry out this plan, was, with many prerogations, in constant activity for the compassing of this object from November, 1529, to April, 1536. With great skill the initiative was taken by an address of the Commons, in which on the one side complaint was made of the increase of heretical teaching ("frantic and seditious books contrary to the true Catholic faith"), and on the other side the notorious weaknesses of the Church appear as a long list of national grievances with the strongly prominent accusation "that such ecclesiastical

laws and measures attack your Majesty's prerogative and do your faithful subjects grievous wrong." The defence of the Church against this was difficult, and was conducted in an exceedingly weak manner, with the excuse that "if certain of the Church's members should unhappily so far go astray, that cannot be said of all." The indictment, charge, and the defence of the bishops are given in Froude, vol. i. chap. 3. It is characteristic that the senile prelatry in this situation thought to strengthen the respect for the Church by the burning of certain heretics. It was only when the new laws began to become more incisive that the prelates found their spokesman in Bishop Fisher, then seventy-six years of age. In the Upper House (to which forty-four temporal and forty-six spiritual peers had been summoned) no serious opposition was manifested. In the feeling that the Court, the Commons, and the mass of the laity were all against them, the Lords agreed to one measure after another. The successive order of them in detail belongs to parliamentary history; they have been grouped above as nearly as possible according to the connection in which they proceed from a well-considered plan. Only on the first declaration of the royal supremacy both Houses of Convocation timidly sought to make the reservation "sole and supreme head of the Church, as far as is allowed by the law of Christ." By the declaration of supremacy the national Church comes into an irreconcilable opposition to the Roman Catholic, yet still with the express reservation that there was therein no intention of swerving from the "community of the Christian Church in any articles of the Catholic faith of Christianity, or in any other things which have been declared by the Holy Scriptures and the Word of God as necessary to salvation." The internal contradiction of such a proceeding was sure to make itself immediately felt. Henry VIII. was aware that with ecclesiastical Rome no such compromises could be made as with diplomatic Rome. He saw himself confronted by a system which must either be absolute and sovereign or else could not exist. The choice was only left him between being the conqueror or the conquered. He would not suffer any doubts to arise as to his decision on this point. In order to suppress by force the opposition to his supremacy in

the highest of his functionaries, he allowed the new laws to take their bloody course against his chancellor, Thomas More, and against Bishop Fisher. On the other side, the question of dogma became for him precisely a question of honour and character. The conformist Catholic powers of Europe, as representatives of established authority and legitimacy, were leagued and banded in opposition against the nonconformist and Protestant powers. Should Henry, turning his back upon his education, his convictions, his participation in theological controversy, and his whole past career, join the dissenting party? Shortly before the dissolution of the monasteries, and in a difficult state of external affairs, he had, indeed, by ten articles touching the doctrines of the Sacraments taken steps towards an approach to the Augsburg Confession. But a definite renunciation of the old dogma was a moral impossibility for Henry VIII. And the great majority of the population also showed itself passive in questions of faith. An individual does not change his faith in days or months, and fortunately nations still less; changes in religion have their origin in the deep convictions of single men, who, tested by hard trials, gain a convincing power over others: these changes proceed, accordingly, from minorities. Henry VIII. was desirous in another direction to allow no doubts as to the limits of his system. He accordingly let penal justice take its course, by the burning of a number of heretics on account of their Catholic heresies; he did not even scruple to sacrifice his upright and faithful servant Cromwell to the deadly enmity of the aristocracy and of orthodoxy. From this vacillating state of affairs those six articles of Gardiner arose, which teach the Real Presence of the flesh and blood of Christ "in the form, but not in the substance" of the bread and wine, and retain the private Mass, celibacy, and vow of chastity. "In Henry VIII. no free self-devotion, no loftiness of soul, and no real sympathy for any living man can be discerned; they are all in his eyes nothing but instruments, which he first uses and then breaks. But he has an unrivalled practical intelligence, and an energetic activity that is employed in the general interests; he combines a fickleness of purpose with a constant firmness of will. One follows the course of his reign with

a mixture of abhorrence and admiration" (Ranke, "*Engl. Gesch.*," i. 224). Only too apposite is the parallel to Richelieu which I have drawn above. A Reformation so politic as this could certainly not exempt the English nation from the serious and severe struggle for the Christian truths, but could only postpone the issue of the conflict to later generations. A system of this description could only close with half measures, viz. 32 Henry VIII. c. 26, 34 Henry VIII. c. 1, such as were quickly abolished in the succeeding reign—an illustration of the eternal truth that no man should dare attempt to become a reformer in ecclesiastical matters without having a deep and hearty conviction himself.

2. The dogmatic Reformation under Edward VI. endeavoured to provide the kernel that was lacking. Its spiritual originators are Ridley and more especially Archbishop Cranmer, whose character, in spite of a yielding clemency, leaves no doubts in the mind as to his truthfulness and his desire to do right, and to whom it was also vouchsafed to seal the truth of his convictions by his death. The same disposition lies in the Protector Somerset, and in the youthful King himself. As an outcome of real personal conviction, the Protestant doctrines of justification by faith, of moral self-guidance, and self-responsibility which can attain internal peace by individual actions, without the need of the mediating services of the priest, now assert themselves. The Common Prayer-book has become the imperishable monument both of the national temperament and of the religious feelings of the time. The doctrines of distinction in the sacraments, the abolition of the confessional and celibacy, and the reform of the ceremonial and Liturgy are completed with the forty-two articles. But it could not be helped that, in the eyes of the majority of the people, it was more a change of government than a change in religion that had taken place. Innovations in the services of the Church and in the Liturgy are at all times unpopular. The masses had learnt other rules of faith, many felt anxious in their consciences, others again felt themselves impelled to a more extensive agitation; among the wealthy classes the interest of a new acquisition still struggled with political scruples against the innovations. This confusion of minds clashed with severe

social difficulties, which required a firm guiding hand. In a time in which monarchical despotism was more than ever necessary, a weak regent stood at the helm of the State, whose inclination for a personal government was in contrast with his capacity. The Protector Duke of Somerset, the uncle of the King, had rid himself of the regency council, which Henry VIII. had instituted by his last will, without possessing the capacity of exercising dictatorial powers as the successor of such an absolute ruler. The unsuccessfully conducted foreign affairs are complicated by the still more difficult internal ones. A frivolous aristocratic regime again returns, which embitters the country people by the confiscation of the common lands in favour of the lord of the manor, by diverse acts of oppression towards copyholders, tenants, and the labouring classes, combined with famine and pestilence. To these is added the inexcusable confiscation of the property of the hospitals and guilds, the seizure of considerable lands belonging to the episcopal sees, as well as the embezzlement of the great mass of Crown lands of the value of £1,500,000, which, in the form of grants, alienations, and exchanges, remained to the extent of at least one-third in the clutches of the "friends" of the ministers (Froude, v. 128). Once again the work of Reformation clashes with the secular interests of the State in a manner that was fatal to both parties. Thus, in an unfortunate hour, the intrigues of a party government by nobles return. The selfish upstart Northumberland, in his restless ambition, brings the Protector to the scaffold and seizes the reins of government, with the ulterior design of bringing the succession into his own family.

3. The Catholic Restoration under Mary is explained by the political situation. Upon the youthful rival Queen, Jane Grey, "the nine days' Queen," was fastened the capital crime of her father-in-law. The remembrance of the aristocratic harshness towards the poorer population had estranged all hearts from Northumberland. No one trusted this man. In the heartless, selfish regency council at the death of Edward VI., there was, indeed, no man, no family, and no party which enjoyed the public confidence. The well-founded feeling of the necessity of a monarchical rule turned accordingly almost unanimously to the legitimate

heiress of the throne, the daughter of Henry VIII., already sorely tried by fortune. The religious opinions had not as yet become cleared. The newly constituted Parliament consisted of about one-third of Protestant members, together with almost two-thirds who were supporters of a "national Church," which was inclined to treat the dogmas of faith as open questions. The supporters of the papal ecclesiastical government form still a diminishing fraction. But the majority, considering only the exigencies of the times, sacrificed the reformatory legislation of Edward VI. in such a frivolous manner that the steadily Romanizing tendency gained the upper hand as early as in Mary's second Parliament, to which the sheriffs were expressly ordered to send men of the "wise, grave, and Catholic sort." This honourable assembly joined with the Lords in a supplication, which in deep sorrow for the past proceedings, repeals the Acts of Parliament against the Pope "under the condition that he will confirm their acquisitions of abbey and foundation lands." At this price these wise men allow the Queen and her fanatical counsellors full liberty in the burning of the primate and the chiefs of Protestantism. From time to time the unhappy woman upon the throne believed that by the acceptable sacrifice of heretic-burnings she would see her hopes of the birth of a successor realized. The third "Reconciliation Parliament" displayed the debasing spectacle of Lords and Commons falling down upon their knees, confessing in all humility the sins of their apostasy, and receiving complete spiritual absolution at the hands of Cardinal Pole,—reserving the possession of the ecclesiastical estates. Thus did the political party of the national Church make a retrograde movement from Protestantism to popery, and at the same time ruined itself in the estimation of the nation. Still more exactly characterized indeed was the nature of the Catholic counter-reformation and its leaders in England; "*Solam Romam queritis, sola Roma destruet vos*," as Glanvill had once upon a time exclaimed to the canons of Canterbury. But for the English Protestant Church the burning of bishops and of women and children, accompanied by the horrible scenes of a Spanish Inquisition, was a time of internal purification which under "bloody Mary" for the first time established

the English Church in the hearts of the people.

4. The Anglican State Church of Elizabeth is the fusion of the external and internal sides of the Reformation. In sincere conviction and in the clear comprehension of her royal vocation, she restores the royal supremacy of her father and her brother's work of reformation, combined in one great act. The decided step of the Queen is followed at once by the sanction of Parliament in the Act of Supremacy and Uniformity, 1 Elizabeth, c. 1, 2. In the Upper House now only nine secular peers with nine bishops vote against the Common Prayer-book; of 9400 clergymen in England only 189 were compelled by this Reformation to lay down their livings. In real conviction, the Roman Catholic faith still lived on in a continuously diminishing minority. The bearing of the people is now entirely different from that under Edward VI. The worldly idea of a Church which should politically separate itself from Catholic Christendom, and yet should remain Catholic in its faith, has completely disappeared! The distinguishing doctrines, the discarding of celibacy and the confessional, the fundamental doctrine of justification by faith, are not conventional forms of belief which have been learnt by heart,

but they are in harmony with the manly character of this people. On that very account they mostly follow the doctrines of Luther and Melancthon, but in sober dogmatism sometimes resemble more those of Zwingli and Calvin, with a comparatively small admixture of the ecclesiastical doctrines of Augustine. They reject the caste-system of the mediæval Church, and resolutely subordinate the Church in its outward existence to the executive, rejecting all foreign control on earth from beyond the four seas. The Anglican Church is no longer a political system, but an honest Protestant faith, which constitutes itself as a Church, in the fixed intent to act rightly and in a Christian spirit. Under severe trials the victorious power of religious conviction has asserted itself in the face of every diplomatic policy. And thus is the position of the Church henceforth fixed with regard to the Protestantism of the Continent, with which Elizabeth and her statesmen openly, loyally, and steadfastly enter into an alliance. All the essential points of the Anglican Church have been completed in the first year of Elizabeth's reign. Her later laws are only supplementary, establishing and strengthening it against the antagonists who assailed her from opposite sides.



## CHAPTER XXXIV.

**The Court of High Commission and the Administrative Organization of the State Church.**

THE administrative system of the State Church was developed from these events in consistent legal continuity. The Church had grown up as the school of the people; both for State and people there existed only one ruling Church—one Church proclaiming the Word of God, organized in an established bureaucratic form. According to the views the nations had held for a thousand years, there was on that very account only one Church. And this view was based upon the good reason, that the rights of marriage and kinship, the law of inheritance and all moral family relations from the cradle to the grave, the public instruction in all grades, and the intellectual life of the nation, and all institutions which serve the civilizing and humanitarian purposes of the commonwealth had been for centuries so closely interwoven with the legislation, administration, and judicial system of the Church, that there was no room possibly for two Churches in one political system. According to the spirit of the times, religious ideas could not be mere spiritual ideals. In the same degree in which the Roman Catholic Church had become external, the State Church also, which had become severed from it, could only find its support in real estate, in ecclesiastical authority, and in the person of the King. The existence of the great creation of the times and the nation, the possession of many thousand livings and of newly acquired property upon secularized soil, now stood and fell with the ensuing political institutions.

I. For supreme Church government the high spiritual court, **Court of High Commission**, was established. The right to this organization had been already in principle recognized by Parliament under Henry VIII. viz. "to visit, repress, redress, reform, order, correct, restrain, and amend all errors, heresies, abuses, contempts, and enormities which fall under any spiritual authority or jurisdiction." Henry VIII. had sagaciously placed the first organization in the hands of one man, his vicar-general. Under Edward VI. a

general visitation by mixed commissions after the manner of the six circuits of the secular jurisdiction had been arranged. Elizabeth, by giving to her supreme court a corporate form, was the first to endow it with a definite character, and though it was still separated for the two great ecclesiastical provinces, yet in both it remained an attribute of the royal sovereignty. "All such jurisdictions and privileges, as were formerly exercised by a spiritual or ecclesiastical power for the visitation or correction of the Church, shall be for ever combined and bound up with the sovereign Crown of this realm" (1 Eliz. c. 1 sec. 16 *seq.*). Whilst the Church attributed to the bishops and their primate a divine appointment, she had declared these powers independent of every other will and influence of any estate. In this complete sense, the government of the Church could now be seen to have passed from the Pope to the King, and these powers, restricted to the "carrying out of the Reformation," had been at first delegated by Henry VIII. to his vicar-general. After this had been completed, it appeared necessary, according to the system of the Church of the Middle Ages, to delegate the supreme jurisdiction and supervision to a bench-court. By the Act of Supremacy the Queen was empowered to form a "Court of High Commission" of this sort, with officers, who were revocably appointed by patent, exercising concurrent jurisdiction with the Privy Council in temporal matters. Its constitution is what is in Germany known as the *Consistorial-verfassung*, which by the formation of courts composed of legal, administrative, and spiritual members, maintains the connection between the secular and clerical rule; in England it henceforward forms of bishops, members of the Privy Council, and other secular officials, the central department of ecclesiastical government. The immediate declared object of the first commission of 1559 was a "general visitation of all churches," with the right of suspending, depriving, and punishing clergymen. Pensions were granted to those persons who voluntarily resigned. The clergy who were dispossessed of their livings under Mary were to be reinstated; and all who had been imprisoned on account of religion set free after a summary investigation. Thus far the new arrangement had become necessary, in consequence of the confusion which had taken place under Mary. But the Court of High Commission obtained also the power of proceeding by inquisition, as was customary (that is, without a jury), to interfere in cases of heresy, errors, abuses, and anomalies in ecclesiastical matters, and to inflict fines and imprisonment. The constitution of the court was a comparatively fluctuating one. At its zenith (1583) it consisted of forty-

four commissioners, among whom were twelve bishops, and a still greater number of privy councillors, besides other clerics and laymen. "It shall from time to time by a jury or by witnesses and other means examine into all infractions of and offences against the acts of uniformity and supremacy and two other acts; as well as inquire into all heretical opinions, seditious books, disobedience, conspiracies, false rumours, slanderous words, etc., against the said laws." Three commissioners (one of whom must be a bishop) are empowered to punish all persons who do not attend the church in compliance with the Act of Uniformity: to examine and reform heresies and ecclesiastical dissensions: to dispossess of their livings all such persons as assert doctrines contrary to the Thirty-Nine Articles: to punish fornication: to examine on oath all suspicious persons: to punish the disobedient by penance, fines, and imprisonment: to alter the statutes of colleges, schools, and foundations, and to demand the oath of supremacy. (1)

But in addition to this spiritual privy council, the corporate constitution of the Church of the Middle Ages upon the whole was continued from the old into the new Church. In both Houses of Convocation the periodical association of the prelates with the parochial clergy still continues in the old form. It was retained as being the constitutional form of taxing the clergy. By the side of, and subordinated to, the Court of High Commission there existed here also a synodal system, in which the bishops with representatives of the chapter and delegates of the parochial clergy form a parliamentary body, which in subordination to the national government and the national legislation exercises a *jus statuendi* and a right of voting supplies, in permanent connection with the Upper House of Parliament, through the bishops who take their seats in both Parliaments. The common existence and common

(1) As to the Court of High Commission, cf. Burnet, "History of the Reformation," ii. 358; Reeve, "History of the English Law," v. 216-218. As in the Star Chamber, so in this court, a purely official procedure prevailed, that is, the inquisitorial procedure in form and spirit. In England also the truth is manifest, that in a pure official body and for the discipline of an official staff, this fundamental form is the proper one. Some scruples are certainly shown by the temporal courts of law as to the constitutional character of such an institution, and complaints are raised against the inquisitorial nature of the oath (oath *ex officio*) later introduced

into it. But the prevailing opinion of the times nevertheless regarded the Court of High Commission as a necessary consequence of the Reformation. The opposition of Leicester, Burleigh, and other of Elizabeth's councillors was probably the outcome of the jealousy of the temporal and spiritual statesmen of the time. The court in its corporate capacity did not exercise more than the constitutional powers, which had been from all time allowed the ecclesiastical government, and the degree of rigour that it practised for the carrying out of the work of reformation, was for a long time necessary and therefore popular.

work under this constitution gave the clergy, which was (even under Elizabeth) wavering in dogma and ceremonial between two extremes, a steady tendency and a general consciousness of the nature and the right of the Anglican Church. The necessity of the royal consent to their convocation and to their decrees, and still more the official position of the bishops, maintains their subordination to the executive. Convocation in its later development became certainly a dangerous instrument for the re-awakening a spirit of caste among the clergy. In the period of the Tudors this danger was, however, not very palpable, so long as the appointment and management of the court were conducted with a view to moderating that tendency.

II. *The diocesan government* of the Anglican Church remains unchanged in its essential features. In this intermediate degree of the ecclesiastical rule, the Reformation does not show itself so much in altered forms as in the changed spirit of the officials. The archbishops and bishops retain the customary powers of ecclesiastical control and of jurisdiction within their dioceses, but are subordinated to the King both as to appointment and continuance in office (31 Henry VIII. c. 9, and special statutes). So soon as a bishop's see becomes vacant, the King grants the Dean and Chapter a *congé d'élire*, with a letter in which the name of the person to be elected is contained. If the election be delayed for twelve days, the King appoints directly by letters patent. Cranmer and certain bishops had even under Henry VIII. accepted an appointment *durante bene placito*. On Edward VI.'s accession the bishops were compelled, in the same way as other administrative officers, to obtain new commissions, by virtue of which they held their offices revocably "as delegates of the King, in his name, and under his authority." Elizabeth, after some interruption, restored this relationship, and asserted a personal right to suspend and dismiss the prelates. Such a bureaucracy lacked, of course, the social independence of the Roman Catholic prelacy. The standing armies and fortified towns of the ecclesiastical state had all disappeared with the monks and monasteries; the power of their material possessions was weakened by secularization, and all offices which were important for the political position of the Church were subordinated to the monarchy. Together with the bishopric the whole ecclesiastical bureaucracy was made primarily subservient to the royal primate. (2)

(2) In the bishops' dioceses a change was made by the six new bishoprics which Henry had founded from the monasterial lands, viz. Gloucester, Bristol, Peterborough, and Oxford,

which belonged to the province of Canterbury; Chester, and Sodor and Man, which belonged to York. The jurisdiction of the bishops over the laity in the customary province of

III. *The position of the lowest grade of the ecclesiastical local offices, Rectories and Vicarages, remained unchanged externally; but unfortunately the Reformation did not restore to the office of parson what belonged to it of right. The tithes appropriated by the monasteries remained diverted from their parochial purposes. Numerous offices, which involved the cure of souls, were held by insufficiently paid vicars, which was chiefly the cause of the comparatively low degree of education enjoyed by the great mass of the clergy. This was one of the results of the aristocratic tendency of the Church, and was fraught with important consequences. By means of the far-reaching right of patronage the living is in close connection with, but also in dependence upon, the landed gentry; by the grants of a Church rate, that became periodically necessary, it is made to a certain extent dependent upon the parish. As in the highest grade of ecclesiastical government the spiritual and temporal state unite in a mixed court, so also upon this lowest level does a union of both take place in the constitution of the parish. (8)*

The whole laity is subjected in ecclesiastical matters to this bureaucratic state, which in its various grades is subordinated to the Crown. Those who were formerly subjects of the ecclesiastical state have since the Reformation entered into a new relation of subjection to the Crown, in the same fashion as, according to the centuries-old ideas of ecclesiastical government, every Christian has become a subject of the representative of St. Peter. To the temporal oath of allegiance the spiritual is added; abjuration of the papal power is now the duty of all subjects, and violation of this duty is treason. By 28 Henry VIII. c. 10, whoever defends the authority of the Bishop of Rome by writing, printed matter, sermon or doctrine, document or act, is subjected to the penalties of a *præmunire*; he who refuses the oath of abjuration, to the penalties of high treason, which in later legislation are extended to many other more detailed actions. The statute of Elizabeth demands the oath of supremacy of all persons in orders, graduates of the universities, schoolmasters and private tutors of youth, barristers and members of the Inns, attorneys and notaries, sheriffs, under officials of the courts of justice, and all officers and servants of any court, under penalty of a *præmunire*. It was the traditional

civil and criminal cases remained unchanged, with the modification that heresies were otherwise dealt with by the modern legislation. It was thought that the most pressing demands had been satisfied by the introduction of a few reforms in the spiritual courts.

The decayed temporal local courts and the periodical assizes and quarter sessions were certainly not fitted to take over this jurisdiction.

(8) The development of the constitution of the parish is described at length in chapter xxxvi.

opinion of the age, deeply rooted in all classes of society, that the confession of the true Christian faith was the condition of all political rights, even of citizenship of the State. To alter such notions, to overcome the dissensions between clergy and laity, and the spirit of caste of the Roman Catholic clergy, and to blend what was general and ecclesiastical with what was national and particular, was not the work of one generation, but of permanent institutions, working in another spirit. The acts of supremacy and uniformity appear, it is true, as rigorous restrictions of personal liberty; but they were the necessary counterpoise to the much severer, much more exclusive system of the Roman hierarchy, which could never have been overcome by compromise and tolerance. The State Church, in the measures it adopted for the combating of heterodoxy, could, beyond all dispute, never be compared with the Roman Catholic Church in respect of the bloody, passionate measures employed by the latter. On the other hand, the State Church appears in truth more censorial, more magisterial, and more irritating with its long list of fines and imprisonments, its banishments, and innumerable penal cases of *præmunire*. Not everything, however, is to be regarded as heresy, which appears as such to the government of the time, but only "that which a recognized general council, the canons, or Acts of Parliament have expressly declared to be heresy." (4)

(4) The ecclesiastical allegiance had been for centuries historically fixed in the hearts of men. Elizabeth's reign, however, from the first had not tended to enforce these laws according to the letter; they were to be, in the hands of the tutorial spirit of this administration, as tools which might be employed or not, according to circumstances. In the first twenty years no capital punishment was carried out against papists; fines and imprisonment were deemed sufficient for the purpose; and these produced as a rule an external conformity, with which the authorities could fairly enough be contented. The Catholic peers were dispensed from the oath of supremacy. It was not until the second half of Elizabeth's reign that the rigorous enforcement of this legislation began, linked hand in hand with the irreconcilable hatred of the Catholic party in Europe against the person of the Queen, and with a series of attempts upon her life, and conspiracies and intrigues against her government. In this direction also the person of the Queen is identified with

the Reformation, and the religious and the political questions were not as yet separable. It is only too true that the Catholic sovereigns of Europe still adhered to the doctrine of their father confessors with regard to the identity of Protestantism and anarchy, destruction of all religion, and disorganization of society. To the good Catholics of those times Protestantism had almost the same meaning as at the close of the eighteenth century French republicanism had to the higher classes. Elizabeth found herself in this later epoch in a state of defence against mortal foes and under the political necessity of "prevention." She pointed to the deeds perpetrated by the Roman party in the Netherlands and in Catholic countries and above all, and rightly, to the laws of her own land, as has been expressly said by Lord Burleigh: "The allegation of the popish ministers in Paris, noting that her Majesty did promise favour, and afterwards did show extremities to the Catholics, is false. For her Majesty, at her entry, prohibited all change in the form of

As a consequence of this conception, among other things the censorship of the press, also a significant element of power, passed from the Church to the Crown. An outcome of the struggle of the Church with the free-thinkers, towards the close of the Middle Ages, it first of all appeared as an emanation of supremacy. But it might also be attributed to the prerogative of the supreme maintenance of the peace, and was after the Reformation principally brought before the King in council. The right that was everywhere acknowledged, and the necessity for the censorship of the press which was on all sides asserted, is the most sufficient testimony of the degree in which the necessity for a uniform Church in a uniform State was rooted in the ideas of the nation. (5)

The spiritual relation of allegiance has been thus defined in all its relations. The old and new powers of the ecclesiastical government, the old authority of the "holy Church," the wonted allegiance of the laity to the Church,—all these form a chain of new forces in the power of the Crown. The provident protecting spirit of the ecclesiastical government pervades the whole of the political system and unavoidably influences also the character of the contemporary administration.

religion as she found it by law, and when by law it was otherwise ordered by Parliament, she did command the observation of the law newly established, punishing only the offenders according to law. So her Majesty's actions are justifiable at all times, having never punished any evil subject but by warrant of law" (Murdin's State Papers, 666).

(5) In exercise of the censorship of the press the Privy Council, after the invention of printing, issued frequent ordinances against the introduction of books and the regulation of their sale. According to an ordinance of Mary the possession of heretical or highly treasonable books is declared to be rebellion, and punishable according to martial law. According to the ordinance of 1559 no one was to print a book or paper without the previous licence of the Privy Council or of a bishop, and now, on the other side, the possession of Catholic controversial writings is re-

garded as especially punishable. In 1585 the Privy Council issues more rigorous ordinances for the regulation of the press, the registration of all printing-presses, the prohibition of all printing except in London, and a single printing-press in each of the two university towns. No one is to print a book or aught else until it has been seen, read, and approved by the Archbishop of Canterbury or the Bishop of London. The printers of statutes must obtain the *Imprimatur* of the justices. The sale of writings otherwise printed is punishable by imprisonment, and the Stationers' Company is empowered to have all the houses and shops of the printers and sellers searched, to seize all books printed in disobedience to these ordinances, to destroy the presses, to arrest the delinquents, and bring them before the council. Thus even under the Tudors, the weapon of press-censorship was employed for purposes of restriction.

## CHAPTER XXXV.

## Privy Council—Star Chamber—Courts of Justice.

WITH the retrogression of the power of the nobles after Henry VII. the Continual Council fell back into its original position. As in the fourteenth century, it is again the deliberative body, with which the King administers the whole of the business of the realm, so far as it does not devolve upon—

(i.) The central and lower courts in the ordinary course of justice;

(ii.) The Exchequer and the several administrative departments in the ordinary course of administration.

(iii.) The Parliament for extraordinary deliberation.

I. The members and the functions of the council are also actually again an emanation of the royal will, independent of any controlling influence of Parliament. "The King's will is the sole constituent of a privy councillor" (Coke). The name "Privy Council," which, sometimes occurring at the close of the Middle Ages, now becomes its regular title, is connected with this idea. The council certainly contains many names of lords, partly included as great officers, and partly for the sake of honour, and of certain dukes and earls as heads of the peerage; but an overflowing of the council by the Upper House (such as took place under Henry VI.) has now ceased. (1)

(1) The members of the Privy Council at the accession of Henry VIII. comprised the Archbishop of Canterbury (who was at the same time Lord Chancellor), the Bishop of Winchester (Privy Seal), the Earl of Surrey (Lord Treasurer), the Earl of Shrewsbury (Lord Steward), Lord Herbert (Chamberlain), Sir Thomas Lovell, Sir Henry Wyatt, Dr. Routhale, Sir Edward Poinings, Sir Henry Marney, and Sir Thomas Darcy (State Papers, i. p. 507). Later, in 1526 and 1540, the professional bureaucracy was much more largely represented (Nicolas, vii. p. 4). In the North, the English *Vendées* of those days, this was a reason for dis-

satisfaction, and caused the rebellion of 1536. One of the popular grievances was "that the Privy Council was formed of too many persons of humble birth, whereas at the beginning of the reign it had consisted of a much larger number of nobles." Henry replied to this: that on his accession the council only consisted of two high-born lords, that others had only been made knights and lords by him; and that the rest had been lawyers and clerics, with the exception of two prelates, those of Canterbury and Winchester; that there were at present many nobles in the council, the Dukes of Norfolk and Suffolk, the Marquis of Exeter, the



As a symptom of the returning importance of the bureaucratic element, there now appears a law concerning the position and rank of the officers of the realm—"in consideration, that it is a part of the prerogative of the King to give his councillors and other subjects a dignity and position as in his wisdom appears best,"—the Statute of Precedence (81 Henry VIII. c. 14) is passed. First of all the vicar-general, as the King's representative in the ecclesiastical supremacy, shall take precedence of the Archbishop of Canterbury, in analogy to the Lord High Justice of former days, in respect of the laity. And then the rank of the ordinary officers of State was arranged as follows :—

1. In the first place the *Lord Chancellor* or *Keeper of the Great Seal*, who combines the various functions, dating from different times, of Keeper of the King's Conscience, head of the equity jurisdiction and the chancery of the realm, and as a rule also, of president of the Upper House, together with certain new legal duties. (2)

2. The *Lord Treasurer*, now directing minister of the finance department, and at times also leading minister of State. His sub-treasurer lays every year before the King a report of the revenue, such as is extant for the year 1507, and a whole series of the time of Henry VIII.

3. *The Lord President of the Council*, not as yet an essential officer. Occasionally the Lord Chancellor, the Lord Keeper of the Seal, or a court official, had the formal direction of the council; but in case a special president was appointed, he took the third place.

4. *The Lord Privy Seal*, until 80 Henry VIII. regularly an ecclesiastic, since that time as a rule a temporal lord.

5. *The Lord Chamberlain*, an hereditary office without administration.

6. *The Lord High Constable*, extinct as an hereditary office in 1521; since that time only created for one day at the coronation.

Earls of Oxford and Sussex, etc.; and that finally it was not the business of his subjects to appoint his council for him, and to interfere in matters which did not concern them (State Papers, i. 507, 508).

(2) *The Lord Chancellor* was for the first time also styled *Cancellarius Magnus* under Henry VII. on the occasion of the opening of Parliament (Foss, "Judges," v. 5). The historically doubtful office of Lord Keeper was defined by a declaration in 5 Elizabeth, c. 18, to the effect that both offices should be identical. The Chancellor is now also the overseer of charities (43 Eliz.

c. 4). In consequence of the Reformation, a secularization of the office is gradually brought about. After Sir Thomas More the chancellors are sometimes spiritual and sometimes temporal statesmen; after Lord Keeper Pickering (1592) until our own day, with one single exception (Bishop Williams), they have been only lawyers. The numerous offices of the Chancery were now further increased by the *Six Clerks' Office*, consisting of six *notarii publici*, who were formally incorporated under Henry VIII. and Elizabeth for the purpose of registering documents.

7. *The Earl Marshal*, a court office and heraldic office, without any department of State attached to it.

8. *The Lord High Admiral*, after 7 Richard II. regarded as an hereditary office, for the administration of the Admiralty ; at that time of little importance.

9. *The Lord Steward of the Household*, administering head of the court.

10. *The King's Chamberlain* in an influential position, frequently employed upon special missions, but without any administrative department.

11. *The King's Secretary*, at first merely an official of the second grade, but already a very influential member of the Government, who, at all events from the time of Elizabeth, had become one of the principal ministers of State. Shortly after 1589, the increasing pressure of business caused the appointment of two secretaries with similar duties. Each of them receives a signet for the sealing of all warrants and cabinet letters, "both inside and outside as was customary ;" both keep their journal open for constant mutual inspection. Under Elizabeth there again appears one secretary, Sir W. Cecil, who as such was regarded as the most influential member of the Government. In later times, on the appointment of his son to a similar post (1601), the title of "our Principal Secretary of Estate," evidently in the meaning of a Minister of State, occurs for the first time. (3)

In connection with this office new regulations were issued as to the procedure to be observed in the use of the royal seal. In the privy councillor's instructions of 18 Henry VI., a rule was contained for the gradation of the signet, privy

(3) The history of the origin of the Secretary of State has been given by Sir H. Nicolas (vi. p. 117, *seq.*), as well as in a famous judgment of Lord Camden (*Entick v. Carrington*, Howel, "State Trials," vol. 19). The *Secretarii Regis* who are met with in earlier times were officials charged with special missions. Such were J. Maunsel, in 37 Henry III., and Franciscus Accursii of Bologna, in 6 Edward I. After the Keeper of the Privy Seal became a high State officer, a Cabinet Secretary naturally appears again in the confidential post that was formerly filled by the Lord Privy Seal, and in still earlier times by the Chancellor. This secretary is, however, during the Middle Ages, an officer of the third grade. Under the house of Lancaster a second French secretary was attached to him, who, even after the loss of the French possessions, remains still as

"Secretary for the French language."

In 1514 a Latin Secretary was also created for the Latin correspondence (not abolished until 1832). Under the Tudors the first Cabinet Secretary had advanced to the importance of a Cabinet Councillor. He ranks in 1489, at the confirmation of the Treaty of Peace with Portugal, in the list of witnesses, among the barons ; and Dr. Routhale retains the office even for six years longer as Bishop of Durham. Under Henry VIII. he appears as a principal member of the council ; he is often a bishop, after the Reformation, as a rule, a layman. He still remains a court official, and has his apartments in the household, with three servants, eight horses, etc. He is appointed by delivery of the signet ; in the year 1558 a patent is also added. An oath of office is first mentioned in the Oath-book of 1649.

seal, and great seal respectively (Nicolas, vi. pp. 187-193). The regulations of Henry VIII. secure a triple control. It was decreed that every gift, grant, or other written donation of the King under his signet, which is destined to pass under the great seals of England, Ireland, etc., or by any other procedure of the Exchequer, before passing under the said seals, must be delivered to the King's chief secretary or to one of his cabinet secretaries, in order to pass the signet office. The secretary shall within eight days address, in the King's name, *letters of warrant* under his signature, and furnished with the King's signet to the Lord Keeper of the Privy Seal. One of the clerks of the privy seal is then, after proper examination by the Lord Keeper of the Privy Seal, to send within eight days, a further warrant to the Lord Chancellor. (3<sup>a</sup>)

The precedence of the great officers contains a mixture of social and purely official considerations. The most important great officers (the Lord Chancellor, the Lord Treasurer, the Lord President, and the Lord Keeper of the Privy Seal) are to rank in Parliament before the dukes, if they are peers by birth or have been ennobled. The Secretary of State, if he is a peer, ranks above the other barons. Moreover, the customary rules are adhered to which have become established in the House of Peers. "Where the Lord Chancellor, the Lord Treasurer, the Lord Privy Seal, or Secretary of State are below the rank of a baron, and have not therefore a right to vote, they shall sit upon the highest part of the sacks in the Parliament chamber in the above order." Where two secretaries of State are appointed, they shall both be present in the Upper House whenever the King or the Speaker is present. Otherwise they shall take alternate weeks, the one in the Upper House and the other in the Lower, but in particularly important business they shall both assist at the proceedings in the Lower House.

Special regulations were also issued by Henry VIII. touching the business procedure of his council. According to the rules of business of the year 1526, the administrative body

(3<sup>a</sup>) From this process all warrants are excepted which the Lord Treasurer *ex officio* immediately issues for offices and lands within his gift. In like manner it is left to the discretion of the Lord Chancellor to proceed in urgent cases without the fees for the great seal, signet, or privy seal. Moreover, the King's express commands in private and State affairs remain reserved, without warrant and without private fees (Nicolas, vi. pp. 201-203). In later times there was attached to these

regulations touching the State seal the responsibility of the Secretary of State to Parliament. And, under the presentiment of coming events, a King's secretary even in those days complained of the constitutional indefiniteness of his position. "All officers and councillors of princes have a prescribed authority, by patent, by custom, or by oath, the secretary only excepted;—only a secretary hath no warrant of commission," etc. (Thoms, "Book of the Court," 257).

was at that time to consist of twenty persons, namely, fourteen state and court officers, four peers, and two bishops. For the smaller Cabinet Council, which was to remain continuously in close attendance upon the King's person, ten members were designated. For daily duty with the King the secretary and two clerics were appointed. After the manner of a modern Cabinet Council, the internal government of the realm was conducted by the council thus constituted with tolerable regularity. An extension of the system of personal government is however shown in this, that Government measures by no means invariably proceeded from it; they were not even all deliberated upon in the council. Henry VIII. was not usually present at the ordinary sittings, and only reserved to himself the right of personal signature. Important measures of foreign policy proceeded from the King himself through the pens of his secretaries, and often through those of others. In confidential matters he corresponded with his own hand and read all letters himself. Wolsey and Cromwell were his principal advisers so long as they remained in favour; after Cromwell's fall, he addressed his orders sometimes to one and sometimes to another of the ministers, but none of them was again able to gain an ascendant position. The communications between the King and the heads of the departments passed, in accordance with the rules of business, regularly through a privy councillor. Under Elizabeth, William Cecil was in a very favoured position. Under Elizabeth, in fact, the council reached the height of its political importance. For the internal government of the country it is the era of the King in council and of wise laws. In many of these laws, originated by the intellects of Elizabeth's statesmen, two whole centuries of subsequent legislation have found little to improve. (4)

The delegations and commissions of the council, which even in the preceding period exercised an extraordinary civil and criminal jurisdiction, develop in this period into a peculiar new creation, which requires a special description.

II. This is, *The Privy Council as Star Chamber*, the Star Chamber of world-wide notoriety, the institution of which was first brought about by social disorders, and afterwards by the controversies of the Reformation.

(4) The rules of business prescribed by Henry VIII. for the Privy Council are contained in the regulations laid down for the royal household of 1526 (Nicolas, vii. pp. 5-7). As to the voting in the council, according to an old custom, the youngest member voted first, the King himself last (Coke,

"Inst." iv. 35). The extant records of the Privy Council, especially those of the years 1540-1544, which are very detailed, certainly show a curious mixture of great and petty business, and particularly a strange picture of the Star Chamber justice of those days.

It was at first the remnants of wild party struggles, the partiality and venality of the sheriffs and the juries, the insolence of the magnates and their armed retinues, which rendered an energetic police system under Henry VII. necessary. "In consideration of existing great tumults and illegal assemblies, corruption and partiality," the stat. 3 Henry VII. c. 1 empowers the Chancellor, Treasurer, and Keeper of the Privy Seal, together with a bishop, a temporal lord of the council, and two justices of the realm to examine persons upon royal order, and to punish them for seven offences specially enumerated, among which are sedition, illegal assemblies, and factious unions with distinctive liveries and badges. This is the extraordinary criminal power of the King in council (*supra*, p. 340) which had never ceased, and which was here acknowledged afresh and embodied in a commission. The King only announces that, owing to the necessities of the times, he intends to exercise his criminal jurisdiction, and delegates for this purpose a smaller number of privy councillors with the assistance of two judges. Henry VIII. continues the institution, but adds that, in these criminal cases, the president of the council shall also belong to the essential members or quorum (21 Henry VIII. c. 20), and later, that the judges shall only have deliberative voices, by which a freer administrative exercise of the jurisdiction is intended. Analogously by 31 Henry VIII. c. 8, "disobedience to ordinance" is assigned to a number of great officers, bishops, and judges for punishment. The so-called Star Chamber is accordingly only a committee of the Privy Council, on which account also every privy councillor could occasionally take part in the proceedings, and even the whole body sit as Star Chamber, as was done at first in important cases, and later, at all events from Edward VI., was the general rule, whence this penal jurisdiction became quite an ordinary portion of the political business of the ministerial council. The name Star Chamber, as the technical term of an independent tribunal, occurs in no statute; it was only the name taken from the room where the sittings took place, which the popular language applied to the council when administering penal justice. Coke also describes the Star Chamber as *curia coram rege et concilio*, consisting of the "members of the Privy Council, with the assistance of two judges;" only with this difference, that in this later period a claim of the peers as *Magnum Concilium* to take part in its proceeding was again asserted by some, just as had been done in the fifteenth century. (5)

(5) The Privy Council as Star Chamber has been treated of in Hale's "Jurisdiction of the House of Lords," c. v.; Palgrave's Essay on the King's

In the second half of the sixteenth century, however, the following new conditions met together. First of all, the need of the Reformation, with its important inroads on ecclesiastical authority and ecclesiastical property, which, like all radical transformations, required dictatorial powers that could only in later times be limited and circumscribed by law. And next, the spirit of persecution and arbitrariness which, originating in religious controversy, spread an inquisitorial spirit abroad throughout the whole of the political system. Finally, the tacit understanding between the council and Parliament touching the "suitable" extension of such an administrative jurisdiction. It will probably never be possible to explain in legal technical language the altered spirit of the institutions embodied in the stat. 3 Henry VII., and the connection with the old *jurisdictio ordinaria* of the council. The dictatorial sovereignty of the Tudors, at all events, exercised these arbitrary powers in a more moderate and dignified manner than they would have been exercised by a party government with ecclesiastical or political leanings. As to how a party administration of a political tendency and a partial ecclesiastical government would have exercised these powers, the short misgovernments under Edward VI. and under Mary do not allow of a doubt. (5\*)

Council, p. 104, *seq.* The description in Hallam, "Const. Hist.," i. c. 1, is too artificial. Touching the old controversy as to the penal jurisdiction of the council, cf. vol. i. pp. 407, 408. In the temporary stat. 31 Henry VI. c. 2, all cases for the jurisdiction of the council were declared to be "great riots, extortions, oppressions, and grievous offences." The new stat. 3 Henry VII. c. 8 goes further in many various directions, and mentions unlawful maintenance, giving of signs and liveries, tokens and retainers, embracery, untrue demeaning of sheriffs in the returns and panels of juries, great riots, unlawful assemblies, as such offences in which the petty juries were unwilling to do their duty. These statements were, in fact, right. How important the local influence of the magnates still was is shown, for example, by their being prohibited to make their private officials sheriffs. Venality of the sheriffs and juries, deeds of violence, and rascality of all sorts were described in the law-books and by historians as events of everyday occurrence. A passing attempt to extend the summary penal jurisdiction of the justices of the peace beyond its

old dimensions proved abortive in the face of the powerful magnates.

(5\*) A legal difficulty lies in this, that under Henry VIII. and later (1) the penal functions are extended with indefinite limits to a number of new cases, (2) the participation of the councillors is not limited to those persons enumerated in stat. 3 Henry VII., but is extended to the whole body of the council, that is, to those members who actually participated in the proceedings without the assistance of the justices. This is in one direction explained by the discretionary powers, which from all time lent a *jurisdictio extraordinaria* to the council, and which, in spite of much dispute, were ever afresh recognized by Parliament, and exercised according as the needs of the times required, and on the other side, by the nature of the religious controversies. The position of the royal ecclesiastical power could be in no way so clearly defined by legislation as could the old provinces of the temporal administration. The discretionary powers which had here freshly sprung up extend, as is usual, into other spheres (Nicolas, vii. p. 26, *seq.*). That such was less felt, as a public grievance

The proceedings in the Star Chamber were never regulated by law. There were framed for it no such procedure maxims not unlike those of administrative justice in civil matters, that is, analogous to the procedure of the Lord Chancellor in equity cases. A court, consisting entirely of officials, pleadings with witnesses, documents, and affidavits, without a jury, becomes of itself inquisitorial in form, and consequently the use of torture was also gradually introduced. (5<sup>b</sup>)

Thus arises a State court of justice from which there is no appeal, with a somewhat indefinite penal jurisdiction, a terror to the powerful, and on that very account for a long time popular. Contemporary writers speak of it with respect. Sir Thomas Smith, himself one of Elizabeth's ministers, lauds the Star Chamber as a good institution of Wolsey. The most violent opponent of all administrative justice, Sir Edward Coke, who himself, as Attorney-General, took part in its proceedings, says, "It is the most honourable court in Christendom, except our Parliament; this court, if the right procedure and the old rules be observed, keeps the whole of England quiet." A tendency to protect the oppressed was certainly to be praised in such an institution; but it contained also the root of many far-reaching and evil things. Comprising in one body a ministerial council and State court of justice, the Star Chamber could wield an irresistible power over persons and property, by which it systematically trampled down all resisting independence, and finally also every right. What was originally a necessity of the times, a transitional form, perhaps necessary during the conflicts of the Reformation, became occasionally, even in the later part of Henry VIII.'s reign, the scene of petty denunciations on account of "disaffection" towards the King and the law. It was principally the indifference of Parliament which rendered this practice of administrative justice possible. If the controlling influence of Parliament could be entirely dispensed

ance in large circles, is to be explained in some measure by the centralization, which had to contend with great difficulties, in order to summon persons living at great distances, by their bailiffs, and to bring them before the Star Chamber. (*Cf.* Marquardsen in the "Münchener Kritischer Vierteljahrsschrift," 1860, pp. 213-219.)

(5<sup>b</sup>) The procedure of the Star Chamber is essentially that of Chancery, after the pattern of the trials according to canon law, with the Chancellor originally as president. From inquisition in purely bureaucratic bodies the ardent desire to extract confession

necessarily arises, and thence again the custom of torture, which all English jurists have certainly declared not to be a portion of the common law, though it has been acknowledged by all as an extraordinary procedure. Thomas Smith and Sir Edward Coke, who expressed themselves so strongly on the subject, themselves, in the capacity of examining judges, repeatedly applied the torture which was in such cases inflicted on the special order of the King or Privy Council. Individual cases of torture upon royal orders had already occurred in former centuries.

with, this formed the *def* the sixteenth century, however, the tempts at restoring an abscmet together. First of all, the need

III. *The other delegations* is important inroads on ecclesiastical *tribunals* follow again immed property, which, like all radical of the estates. Before all of *dictatorial* powers that could only of the Chancellor, as being an *uncircumscribed* by law. And next, powers of the King in council, *arbitrariness* which, originating permanent position of Master of a *inquisitorial* spirit abroad whole of the Chancery officials, as *weal* system. Finally, the the fixed rules of competence and procedu *council* and Parliament in the main the character of a *jurisdictio orda* an administrative

But besides, there is still maintained the idle to explain in mentary court tribunal, which is to be accessib institutions actions to every subject, as a kind of *forum miserabilium* with *sonarum*. Before the council, under the name of the *oratoria* council, civil actions were still heard, and this special *caese* mission for judicial matters continued unassailed during the period of the Tudors (Nicolas, vii. pp. 16, 22). There existed a certain need for it in the case of actions between native and foreign merchants, disputes of corporations, questions of maritime law, and pauper cases. The English courts of law were even in those days much less accessible than they should have been to the poorer classes, the expenses of barristers and attornies, the fees of the sheriffs and lower officials, and the too great nicety in framing the pleadings in an action, made a court tribunal of this description appear a welcome alleviation in legal procedure.

In close connection with this, stood the so-called *Court of Requests*, which, under the Lord Privy Seal, was composed of several Masters of Requests, doctors of civil law having an analogous position to that of the Masters in Chancery. The origin of this court in the administrative practice of the council is doubtful. Under Somerset's protectorate, probably already under Henry VIII., an institution of the kind is met with. As, however, this court of royal commission had neither a statute nor yet time-honoured usage as its basis, the King's

(5<sup>c</sup>) The character of the court is moreover different under every Government; under Henry VII it forms a State protection against powerful evil-doers; under Henry VIII., Edward VI., and Elizabeth, a powerful instrument for the carrying out of the Reformation. Contemporary writers acknowledge in so far the excellence of its working, excepting in "political cases." But the more important political cases also were at the bottom cases of resistance to the authority of Church and State, and the whole period was still deeply

pervaded with the duty of the magistrates to defend the true faith. Even the extreme ecclesiastical opposition still demanded that the people should be energetically "compelled to the doctrine and confession of the true faith." In the proceedings against Wentworth, the Lower House itself even enjoined an examination to be conducted after this fashion (Reeve's "History," v. 231, 232). The short-sightedness shown in employing such institutions for the most immediate popular purposes has been at all times nearly the same.



The proceedings in the Star Chamber, Elizabeth, in a leading case, declared that it was by law. There were framed for a national court, and was not authorized to administer upon the Crown let it drop.\*

unlike those of administrative in permanent were such commissions of the King's is, analogous to the procedure of were composed with the assistance of a jury, cases. A court, consisting entirely of newly created *Courts of the Steward*; to wit the witnesses, documents, and affidavits of the Lord Steward, Treasurer, and Comptroller of the of itself inquisitorial in for (3 Henry VII. c. 14), and the *Court of the Lord torture* was also gradually, (33 Henry VIII. c. 12), with a criminal jurisdiction

Thus arises a State of treason, murder, manslaughter, etc., in royal no appeal, with a *cesses*.

terror to the power like manner, the *Admiralty Court* in criminal cases, time popular. Under Henry VIII., was constituted by a commission issued Sir Thomas the Star Chamber the Lord High Admiral and certain justices, who were to proceed according to the rules of common law and with a jury, under the style of the *Commissions of Oyer and Terminer of the Admiralty at the Sessions House in the Old Bailey*.

A second group of new tribunals is created round and about the Treasury, for special branches of the hereditary revenue.

This is the *Court of Augmentations and Revenues of the Crown*, which was first instituted by 27 Henry VIII. cc. 27, 28, for the administration of the secularized monasterial estates. To this court was attached the general survey of demesnes, under a chancellor as head for the keeping of the great seal and small seal, two general surveyors, and a numerous body of other officials. (6) In a *Court of Wards and Liveries*, moreover, the administration of the feudal wardships was severed from the *Exchequer*, and in this court the grant

\* A peculiar creation in the form of a kind of commercial court is that court constituted by 43 Elizabeth, c. 12, for the decision of assurance-disputes, composed of a commission consisting of the admiralty judge, the Recorder of London, two doctors of civil law, two common law jurists, and eight merchants, with an appeal to the Chancellor. This commercial court has, however, disappeared generations ago, and indeed, commercial and trade courts and other attempts at the formation of special courts for special trading and professional classes never made any progress in England.

(6) When the stat. 27 Henry VIII. cc. 27, 28, first dissolved the small monasteries with revenues up to £200, a separate *Court of Augmentations* was formed for the administration of the estates thus secularized, at the head of which was a chancellor with a great and a small seal. In later times the

secularization was extended to the great monasteries and other foundations (altogether 2374 institutions). In consequence of this extension, the original court was again abolished by patent, a new court instituted and combined with a general survey (*Court of General Surveyor of Lands belonging to the Crown*), which had been created meanwhile. As in the mean time doubts had arisen as to the constitutional legality of the former abolition by patent, the tribunal was newly constituted by stat. 7 Edward VI. c. 2. Henry VIII. had already, however, alienated and granted away the confiscated estates in large numbers; Mary gave back to the old living the appropriated tithes, glebes, etc., which still remained, and in consequence abolished the whole court. The still remaining administration of demesnes and forests reverts again to the *Exchequer* (1 Mar. Sess. 2, c. 10).

of feudal investitures was conferred, apparently in the well-meant intention of moderating the strict financial principles of the Exchequer. (6<sup>a</sup>)

A third group of a peculiar character is formed by the *new provincial governments*, which were not parcelled off from the central administration, according to the old system of self-government, but on a more bureaucratic pattern. Under the direction of the Privy Council, they formed a provincial delegation of the council in counties where restless neighbours and internal disquietude rendered them necessary. Thus arose in the first instance the president and council in Wales, including Wales and the marches, as well as the counties of Hereford, Worcester, Salop, and Gloucester. Then the president and council of the North, comprising Yorkshire, Durham, Northumberland, and Westmoreland. A concurrent jurisdiction with the council of the North was exercised further by the three courts of the Scotch marches (east, west, and middle marches), which included Northumberland, Cumberland, and Westmoreland. Like the council, these departments have the jurisdiction of commission courts in criminal and civil cases "where one of the parties is too poor to take the ordinary legal course." The judges are empowered to pass judgment either according to the common law and custom, or in the way of equity according to their wisdom and unbiassed judgment (that is, with or without a jury). This last clause was agreed to upon the urgent demand of the rebels in the North. (6<sup>b</sup>) Finally, Lancaster also retained its separate Chancery and Star Chamber, when under Henry VII. it was taken over as a special appendage of the Crown.

This movable organization of the administration, in which an influence of the Reformation and extended bureaucratic powers are already visible to a dangerous extent, is now contrasted with

(6<sup>a</sup>) The *Court of Wards and Liveries* is also a piece of financial administration which passes into the form of a particular administrative jurisdiction. By Henry VIII., firstly, a *Court of Feudal Wardships* was instituted, which had the guardianship of wards and lunatics, gives the king's widows permission to remarry, and exacts the fines for marriage without licence. It is a court of record under a *Master of the Wards*, who is at the same time Keeper of the Seal. The procedure is copied from that of the chamber of the Duchy of Lancaster, with four yearly terms, and with powers of pronouncing sentence of arbitrary imprisonment. A

year after its institution the feudal investitures (liveries) were also assigned to the *Court of Wards*. The court in this form continued until the abolition of the knights' fees under Charles II.

(6<sup>b</sup>) In these new provincial tribunals a bureaucratic spirit of the organization, which as a fact was based upon local exigencies, is visible to a greater degree. A creation analogous to the Court of the North was also a *President and Council in the West*, established by stat. 32 Henry VIII. c. 50, with like authority in the counties of Devon and Cornwall, which was, however, soon abolished.

IV. **The Central Courts of Common Law** in their perfectly unchanged form. The three Courts of King's Bench, Common Pleas, and Court of Exchequer are, as formerly, composed, as need required, of three, four, or five justices. The increase of judicial business in the year 1579 occasioned primarily the appointment in the Court of Exchequer, of Robert Shute, "with equal rank and dignity as the justices of the other two courts." Soon all the assisting judges of this court were appointed from among the leading barristers, who were qualified for the judicial office, and accordingly take part in presiding at the assizes, so that from this time forth the three divisions of the central courts of the realm are, as regards their constitution, on an equality with one another.

The appellate jurisdiction of the Upper House over these official courts of the realm has decayed in this period, because the assignment of higher appeals to the House by writ of error has fallen into comparative disuse. But as in the preceding period an appeal from the Court of Exchequer was directed to lie to a committee of the Council, by stat. 27 Elizabeth, c. 8, a supreme court was so formed for judgments of the King's Bench that the appeal should go from the King's Bench to the united bench of the Court of Common Pleas and the Court of Exchequer. Under the name of the *Court of Exchequer Chamber*, this appellate jurisdiction thus assumed a purely judicial character. Altogether the constitution of the courts and the personal position of the justices appears, in spite of their revocable appointment and their position of justiciaries of the council, to be a dignified one, and maintains during the whole period a high reputation and character for impartiality. The Tudors never enforced their personal wishes in the courts of common law, and in fact never interfered with the regular administration of justice. Their worthy demeanour in this respect reminds us of the best periods of the monarchy in Germany. (7)

(7) The Courts of Common Law, in their external composition, are treated by Foss ("Judges," v. 8, 405, 409, *seq.*). The former customary rule of conferring the dignity of knighthood upon the justices now becomes more rare. Elizabeth, who according to the habit of wise monarchs conferred honours and titles sparingly, was wont only to honour the presidents of the courts with the dignity of knighthood. On the other hand, the Tudors were studious to maintain the personal integrity and external independence of their justices, for which reason a large increase was made in the official salaries. In the

assessment of incomes in 15 Henry VIII., the chief justice of the King's Bench was assessed at 1000 marks, of the Common Pleas at 650 marks, the chief baron at £400, the assistant justices at £400, 500 marks; £240, and £200 respectively. Among the barristers, the serjeants were taxed at £100 to £250, the attorney-general at £500 (Foss, "Judges," v. 99). As to the right of visitation, *cf.* Reeves (v. 250).

Though it is frequently asserted that the justices of these times showed great subserviency to the wishes of the monarchy, yet we must judge this by the standard of the Upper House of these

Supplementary to certain provinces of the civil jurisdiction there exists the equitable jurisdiction of the Lord Chancellor (*supra*, p. 382), which gradually also assumes a judicial character. The Tudors show no inclination to extend this province of their jurisdiction; the stat. 27 Elizabeth, c. 1, even forbids every "application to other jurisdictions to impeer or impede the jurisdiction of the King's courts," and the Crown evinces no opposition, when the penalties of *præmunire* are applied to encroachments by equitable jurisdiction upon the province of the ordinary courts of law.

This fixed portion of the executive administration completes the whole picture of the Tudor epoch. Judicial, parliamentary, and parochial constitution in their entirety display a form of government in which, on the whole, uprightness and efficiency are the dominant qualities. The dynasty had found the realm, on its accession to power, in a state of the utmost disorganization, owing to the transcendent power of the factions of the nobility. To restore the royal power and justice against the mightiest in the land had been its first task, and for this the traditional prerogative gave sufficient power. By the further acts of the Reformation, the powers of the ecclesiastical government passed to the Crown, as an inexhaustible fountain of new elements of strength. After the fusion of the ecclesiastical hierarchy with the monarchy, the temporal institutions are pervaded throughout by a new monarchical spirit, which is most prominent under Elizabeth. But the Tudors made use of this increase in their power both externally and internally in a royal manner, by energetically upholding the Reformation, and by a social and political development of the national strength. Even though the religious element in Henry VIII. was rigidly subordinated to the political, his three children, when they came to reign, by the sincerity of their convictions—though in contrary directions—rehabilitated the monarchy in the religious feeling of the people. The transition from the old to the new Church made a personal government necessary in this province, for which the character of Henry VIII.,

times. As to the honourable attitude of the judges in their remonstrance addressed to the council on account of arbitrary arrests in the year 1581, cf. Hallam ("Const. Hist.," iii. c. 5). Equally honourable is the behaviour of the judges in the matter of a royal order of April 21st, 1587 (in Anderson's Report, 154), where the Queen disposes of an office which was to be regarded as a freehold of the then possessor, whereupon the justices, remembering

their oath, refuse obedience, and the Queen yields. In their capacity as legal advisers of the Upper House, legal questions were sometimes laid before the common law judges, as on the accession of Henry VII. In these functions also the conduct of the judges appears honourable. Henry VIII. himself, in a speech before Parliament, refers to their opinion as to the principle of the constitution of Parliament.

violent indeed, and egoistical, but clear-sighted and energetic, was found sufficient. In this position, Henry VIII. and Elizabeth often put down all resistance to their will in a haughty manner. But, though imperiousness or selfishness may have guided their steps, they never wished to rule without Parliament, but always to govern in accordance with the law. The assurance of Elizabeth, with which at the close of her reign she repaired the error with regard to monopolies, "*that never thought was cherished in my heart, that tended not to my people's good*" (Parl. Hist., iv. p. 480), found a ready echo in the hearts of her people. The faults and harsh deeds of this courageous, energetic dynasty were the faults of the times in which they lived, and of the people with whose greatness, welfare, and right they wished to identify themselves. It is an epoch of great excitement and intellectual movement, such as seldom maintains itself except at the expense of the character of individuals and classes. But all this made the personality of the Tudors, with their courage and energy, the main feature of an era which in spite of all its faults was a great one. (8)

(8) The whole character of this Government must be judged by contrasting the judicial, parochial, and parliamentary constitution with the proceedings against individuals, the Star Chamber, and the laws of high treason of the period. The latter were at all events modified in one respect in the stat. 11 Henry VII. c. 1, which dispenses with the penalties of high treason in the case of the subject who takes the oath of allegiance to a King *de facto* (rightly estimated in Hallam, iii. 196). This is supplemented by a law of Edward VI. declaring the necessity of producing two witnesses to prove high treason. The application of the laws touching high treason to a denial of supremacy is a violent outrage on our religious feelings, but the sixteenth century saw in it a legal consequence of the old ecclesiastical government. In 1 Edward VI. the bloody laws relating to high treason were again repealed, but isolated cases were afterwards again made amenable to heavy punishments. Mary repealed all new felonies as far back as 1 Henry VIII., but proceeded all the more mercilessly in ecclesiastical matters, and in temporal matters more inquisitorially than did Henry VIII. The enormous changes in Church and society had, as in the German Reformation, confused the people's sense of right and wrong, and

made the nation inclined to sacrifice the rights of individuals to a political power which aimed at great ends and showed itself able to attain them. In such times pride and self-importance vanish from amongst the ruling class, and only return when the ranks of society have become more firmly established. In small as in great matters the tendency of the times had been to enhance the personal sovereign power, and to make the nation inclined to endure much with patience. The union of the factions of the two Roses under Henry VII. had, after three interruptions in the course of three generations, ended in the restoration of a regular succession of the dynasty. A wild struggle that had lasted for thirty years, and disaffection and demoralization within, remained as the warning tokens of a change of dynasty before the eyes of the nation. Henry VIII. was on this account from his childhood up "a humoured and spoiled piece of royalty;" but he was also "the majestic lord, who broke the bonds of Rome." The Reformation made him a counterpoise to a still more hated despotism, and his personality the indispensable instrument of the great national work. Compared to a Cardinal Pole and his supporters this kind of absolutism was a brilliant foil. The great majority of the people never doubted in their choice

## CHAPTER XXXVI.

*The Development of the Parochial System.*

WITHIN the development of this period, which was at times tragic but still majestic, and at its close brilliant, there had been formed in the lower strata of the State and of society new elements of coherence which were scarcely noticed in the great movements of the time. As among the dynastic struggles and barons' battles of the preceding period the formation of the estates, which was destined to have such an effect upon the future, pursued its steady quiet course,—so there took place amid the gigantic movement of the Reformation, a development of the local constitution and with it an organization of the lower strata of society, which imparted to the struggles of the following century an unforeseen and entirely novel character.

Hand in hand with the union of the royal and the ecclesiastical administration, which was effected by the Reformation, the provident paternal spirit of the royal supremacy transferred to the temporal State the humanitarian duties of the Church, which the clergy, diminished in numbers and straitened in means, could no longer fulfil, and regulated these offices as permanent duties of the parish. This new system follows closely on the already existing institutions for the maintenance of the peace; but whilst the latter, in their old form, had only been occupied with the warding off of evil, these new institutions adopted the political idea of the Church, viz.: the duty of providing for the poorest and most indigent elements of society. From these points of view, from the Tudor period, the local village constitution, which had up to that time been very insignificant, develops into an important member of the community-system, and thus becomes a fundamental institution of the State. The communal institutions during this period are developed from the lower grades up-

between the two. Contrasted with bloody Mary and Spanish Philip, Elizabeth appeared to the people as an angel of deliverance, with all those qualities which gain for the monarchy the people's love. The Reformation was more worthily personified in the

Virgin Queen than in Henry VIII.: this is proved by the even over-anxious care of the people for the safety of the royal person. All these circumstances combine to enhance the monarchical, and with it at once the magisterial and paternal spirit of the Government.

wards; which in a certain sense is contrary to the former course.

I. *The Constitution of the Parish*, which in the Middle Ages only belongs to the ecclesiastical side of the State, enters into the political State as the lowest member. In their Anglo-Norman form, the tithings appear only as sub-districts, in which the provost, tithing man, in the capacity of judicial and police bailiff, had to carry out the orders of the sheriffs, bailiffs, and chief constables. This weakness of the tithing, which had not even been territorially separated, acted upon the various kinds of landed property, and was in turn reacted upon by them, for close peasant villages with connected farms had never been the rule in England, but, on the contrary, the preponderance of the great landed interests over the copyholders, cottagers, tenants, small tradesmen, and labourers had from early times been firmly established. Church and parsonage accordingly became the centre, the soul of the village. The Sunday gathering at Church service, the celebration of ecclesiastical acts and feasts, and the common graveyard were stronger elements for a local village system than the military, judicial, and police institutions, of which the *villata* is merely a subdivision. Accordingly through a long and silent change the "parish," in the common notions of the people and in everyday language, takes the place of the tithing. In the majority of *villatæ* both are locally identical. But the greater townships include several parishes; and on the other hand the parish often embraces many tithings, especially in the north of England. As within the ecclesiastical and civil state at the head of the Government, so here in the lowest grade the ecclesiastical and civil communities draw closer and closer together. The elements of this union lie partly in the local Church offices, and partly in the Church rates, but most of all in the new offices and in the new rating system, of which the legislation of the Tudors makes the parish the basis.

1. The parson of the place, the *rector*, or, if he does not own the tithes, the *vicar*, is, in the ecclesiastical sense, the head of the parish. Regarded from the point of view of the civil constitution, in respect of rates and public burdens, he is only a distinguished member of the village community, liable to taxation and to public burdens. Since the Statute of Marlebridge, however, the parochial clergy were released from suit of the sheriff's tourn, and so far enjoyed a position of immunity. After the origin of the office of justice of the peace, respectable and wealthy parsons were also appointed upon commissions of the peace, by which means the idea of a magisterial office, even in the civil sense, becomes estab-

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lished. The legislation of the Tudors adds to the parson's office some elements of a police character; the control of the church attendance of papists, the duty of giving information respecting certain offences against the laws of the Reformation, the registration of the characters of domestic servants, and even the infliction of corporal punishment upon vagrants. Later legislation has, however, not continued in this direction.

2. Two *churchwardens* (1) are from the ecclesiastical point of view only subordinate assistants of the incumbent. In addition to these there appear in great parishes also *synodsmen*, *sidesmen*, *questmen*, as assistant officials; but as a rule the functions of the sidesmen are combined with the office of churchwarden. Their duty to give information of all notorious crimes touching the Church, the clergy, and parishioners, is also included in their oath of office and again enjoined in the *canones* of 1603. But in its civil bearings, the office now attains a new importance in consequence of the institution of church rates, which we shall immediately discuss. Whilst the parish is responsible for the keeping of the church buildings in repair, so it obtains an undoubted right to share in the management of the Church property, for which the churchwardens have been recognized by judicial practice as an active corporation. As the decaying office of

(1) As to the office of churchwarden, the practical treatise by John Steer ("Parish Law") lacks historical data. In Burn's "Ecclesiastical Law," the principal information upon the present subject is in the articles "Churchwarden," in vol. i., and "Parish," in vol. iii. Great merit is due also to T. Smith, for the use he has made of the older sources, in his "The Parish" (1857, 8vo). Convincing proofs are here given in particular of the pre-eminently civil character of the institution, and of the old right of the community to the office of the churchwardens. They appear as early as the year 1343 as Wardens of the goods of the Church, in the Rot. Parl. 15 Edward III., and in the Year-books 11 Henry IV.; as guardians of the temporalities of the Church in the Year-books 37 Henry VI. *seq.* 30. It was only gradually that the name "churchwarden" became technical and regular. Judicial practice expressly recognized them as officers of the parish, and not of the patron (Strange's Reports, p. 715), as temporal officers (13 Coke's Reports, p. 70): "of common right, the choice of churchwardens is in the

parishioners, and, if the incumbent chooses one in any place, it is but by usage" (Cases *temp.* Hardwicke, p. 275). "The archdeacon has not the power to elect or control their choice" (1 Salkeld's Reports, p. 166). "The clergyman never summons the vestries; for this is the office of the churchwardens" (Strange's Reports, p. 1045). "The ecclesiastical court has no jurisdiction to ratify a churchwarden's accounts" (*ibid.*, pp. 974, 1133, etc.). "The parish can accordingly remove him at any time from office" (Year-books, 26 Henry VIII., fol. 5). "The parishioners have then the right of appointing other wardens, who shall have an action for the rendering of an account against those who have been deposed" (Year-books, 8 Edward IV., fol. 6). The old ecclesiastical *canones* of 1571 expressly mention an election by the parish. The legal recognition also of the necessity of an annual re-election in 27 Henry VIII., c. 25, sec. 23, expresses that the office was regarded as analogous to the ordinary parochial offices and not to the Church offices.

constable no longer appeared sufficiently reliable for the various functions of a magisterial office, a number of local magistrate's duties were by degrees imposed upon the churchwardens. In the Tudor era it was principally such as are connected with ecclesiastical discipline: the infliction of penalties for non-attendance at church, for breaking the fasts, the desecration of the sabbath, taking part in conventicles; and in later times also the infliction of penalties for tippling and drunkenness, for breach of the game laws, offences concerning weights and measures, tramps and hawkers, etc. All this, combined with their position as overseers of the poor, gives them the position of regular and chief officers of the parish, to be elected according to tradition by the parish, whilst according to the *canones* of 1606, failing amicable arrangement, one churchwarden is to be appointed by the parish, and the other by the clergyman. (1<sup>a</sup>)

8. The lower offices of *sexton* and *beadle* are servile offices, which may also be employed for the secular functions of the parish. The office of *parish clerk* is frequently filled by a young assistant cleric, who assists in responding in the prayers and in other parochial duties. But with the increasing business of the parish he becomes a very active member of the parochial administration, and in this position is also remunerated and appointed by the parish.

Intimately connected with this personal side, is the taxation side of the parochial constitution, the origin of the *church rate* for maintaining the church building. From time immemorial a fixed portion of the church revenue was to be set apart for this purpose. But, as a fact, even in the thirteenth century the revenues of the richly endowed Church

(1<sup>a</sup>) It was the consolidated State Church that, in the Canons of 1608, first raised still greater pretensions by introducing the following clause:—

*Canon 89.* "The churchwardens shall be chosen, if possible, by the combined consent of the clergyman and the parishioners. But if they cannot agree as to such choice, the clergyman shall choose the one and the parishioners the other."

From the point of view of the common law these Canons are as yet binding laws only upon the clergy. The dominating influence of the State Church since the times of the Stuarts has, however, so far succeeded in insisting upon the stronger right of the parson, that this proceeding is the custom in the majority of parishes, and that only in the London parishes the election of both churchwardens by the

parishioners is established as the recognized custom. Moreover their double functions are self-evident; for (1) the wardens as being curators of the church buildings, of the churchyard, the church walks, and in their capacity of guardians of the personal property of the church, are at all events only partly ecclesiastical officers; in their exercise of the police functions of the church, the churchyard, the services and the Sunday, as also in controlling and keeping the church books they are purely church officers; (2) as purely civil officers they appear in the assessment and collection of the church rate, as overseers of the poor, and in their discharge of the duties of a lower constabulary and magisterial office, which is imposed upon them by later legislation.

were no longer sufficient for the purpose, since the episcopal sees and monasteries in increasing numbers claimed the tithes and Church property. Accordingly, appeals were made to the "good will" of the parishioners, whose contributions were from the first voluntary. When, in the face of growing embarrassments, coercive ecclesiastical measures began to be employed in the spirit of the Church government of those days, the temporal courts probably retained a power of prohibition. But on the other hand, in 1285 Edward I. issued an instruction to the justices of the realm, the so-called statute *Circumspecte Agatis*, in which this clause occurs, "that the common law courts shall not punish the spiritual tribunals, if they only administer justice in purely spiritual matters, particularly *si praelatus puniat pro cemeterio non clauso, ecclesia discooperta, vel non decenter ornata*." According to the constitution, as it then existed, this instruction has the force of law, and was in later days described in the stat. 2 and 3 Edward VI. c. 18, sec. 51, as a statute. Thus a right of coercion was indirectly acknowledged as belonging to the spiritual tribunals, and this could be enforced against individuals by excommunication and in an extreme case by interdict against the whole community. As a rule, however, an amicable arrangement was effected. Whenever the clergyman convoked his parishioners through the churchwardens, the villages, accustomed to bear common burdens, were found ready to grant contributions for the keeping in repair and beautifying of the church. The oldest known mention of what was (later) called the *church rate* is in the Year-books of 44 Edward III., where it is mentioned as being a custom in a single parish. At a time, when the court leets gradually began to decay, occasions for assembling the ecclesiastical parish frequently recurred. The raising of these contributions became now a chief duty of the churchwardens. But as the original fact of their voluntary initiative was kept in mind, the condition of a previous consultation with the parish was adhered to all the more strictly, seeing that, in this parliamentary age, the right of co-deliberation for every one who joined in paying the taxes passed from the greater to the lesser affairs, and became a common legal principle. In the course of the fifteenth century, such parochial assemblies appear to have been adopted as a comparatively uniform practice.<sup>(1<sup>b</sup>)</sup>

To the parish, in the ecclesiastical sense, belong all persons

(1<sup>b</sup>) As to the origin of the church rate a great deal has been written in consequence of the controversy of the last generation, from among the mass of which I only here mention the Letter of Sir John Campbell, afterwards Lord

Chief Justice of England, to Lord Stanley, on the law of church rates (1887). Moreover, I may refer to the detailed discussions on the special subject contained in my "History of Self-Government."

who are included in the cure of souls, comprising also women, children, and domestics—inhabitants in the widest sense. But by the demand of positive performances, both in money and in personal duties, there arises the civil idea of an *active parish*—parishioners in the narrower sense of the term—in which designation only those are included who bear their share of the public burdens. The fundamental principle of *paying scot and bearing lot* has made its influence felt as a common-law maxim quite as much in the parish as in the city. The given basis for Church grants was, however, the Christian household as such. The church rate appears accordingly from the very beginning as a personal rate, assessed according to the size of the household, whether this be based upon freehold or copyhold, upon permanent or temporary possession, upon rent or tenure. In this question it was evidently not considered whether or not a parishioner was liable to the judicial and police burdens and parliamentary taxation, but only whether he participated in the permanent benefits of the Church as a permanent member of the parish community. As was customary with other local burdens, in practice those who lived outside the parish were made liable in proportion to the extent of their landed property (Jeffery's case, 5 co. 67). But whilst the temporal taxes are only additions and compositions in lieu of what were originally personal services in the militia, the law courts, and the police, and therefore political rights are primarily regulated by personal liability to service, so also in this parochial burden the tax in money is the chief thing. The quality of a parishioner is accordingly purely determined by his liability to contribute to the parish taxes, as is evidenced by its registration in the parish books. This liability of contribution gives the right to a vote in the parish affairs (Smith, "Parish," pp. 63, 94, and quotations).

The exaction of the church rate, after previous deliberation with the parishioners, became accordingly one of the principal functions of the churchwardens. The assembly of the parishioners took place, in harmony with the object in view, if possible in the vestry, whence these parochial meetings themselves obtained the name of *vestry*. The meeting was summoned by the churchwardens; the chair was regularly taken by the parson, as the landlord of the vestry, and the first member of the ecclesiastical parish, as a matter of courtesy, but a positive right of presiding could be established neither by precedent nor by analogy. In analogy with the tax-granting commoners, the meeting was rather regarded as its own master, in respect to the appointment of a chairman as well as in respect to its adjournment. The

voting was conducted with equal rights for each individual, after the manner of the old courts leet, the parliamentary elections, and the parliamentary resolutions. The mode of giving the vote was, as a rule, by show of hands, but in difficult and doubtful cases by a poll.

According to an enumeration of Stowe, taken from the sheriffs' reports, the number of parishes in the year 1371 amounted to 8632; in the year 1520 their number was given as 9407. The parish, in this form, offered itself to the Tudor legislation as an elastic member for new and important rules of the commonwealth.

II. The most important and most enduring local creation, which proceeded from this union of the ecclesiastical with the civil State, is seen in the parochial management of the poor. The actual relief of the poor devolved in the Middle Ages upon the Church, for which in England one-third of the tithes was set apart. In later times it was one of the chief functions of the monasteries, partly as an original object of their foundation, the duty of hospitality being imposed upon them, and partly because they had appropriated a number of tithes. The temporal legislation only busied itself negatively with measures for the prevention of begging and vagrancy (23 Edw. III. c. 7; 12 Rich. II. c. 7). According to 19 Henry VII. c. 12, beggars who are incapable of work shall go into the hundred in which they were born or have lived for the last three years; all begging elsewhere being prohibited. By 22 Henry VIII. c. 12, the justices of the peace were empowered to settle among themselves upon districts to be assigned to beggars who were unable to work as "begging districts," going beyond the boundaries of which was punishable with the stocks and bread and water. All able-bodied beggars were to be flogged and forced to return to their birthplace or to the place where they had spent the last three years. (2)

But from this time forth the Government undertakes actual relief of the poor. By 27 Henry VIII. c. 25 the individual hundreds, incorporated towns, parishes, and manors are directed to support the poor by voluntary alms in such a manner

(2) The history of the English poor-law legislation is treated of in R. Potter's "Observations on the Poor Laws, on the Present State of the Poor, and on Houses of Industry" (London, 1755); Brown's "History of the Poor Law" (1764); F. M. Eden, "State of the Poor, or a History of the Labouring Classes in England" (3 vols., 4to, 1796); Sir George Nichols, "History of the English Poor Law" (1854); R. Pashley, "Pauperism and Poor

Laws" (1854); V. Kries, "Die Englische Armenpflege" (1865). The Middle Ages adhered strictly to the distinction between the negative and the positive element of the poor relief, and assigned the former to the State and the latter to the Church (23 Edw. III. c. 7; 12 Rich. II. c. 7). The earlier statutes of the Tudors (19 Henry VII. c. 12; 22 Henry VIII. c. 12), were only continuations of this purely police system.

that they be not compelled to beg publicly, under penalty of twenty shillings a month for each person who refuses to contribute. The churchwardens and other wealthy inhabitants are to make collections on Sundays by boxes and other methods for this purpose, and the clergy are to make use of every occasion to exhort the people to charity. The duty of employing those capable of working, and that of helping the incapable was laid upon the churchwardens or two "others of the parish." The parochial poor-law system of later times was thus founded in its essential outlines. The principal cause of it was the early changing of feudal into free labour, which at times occasioned great fluctuations and distress among the labouring classes. Under Henry VIII., as the date of the statute proves, the first impulse proceeded rather from momentary calamities than from the abolition of the monasteries. But through their secularization there naturally devolved upon the Crown a moral duty to make actual provision for the poor, seeing that the appropriated tithes were also charged with this obligation. These had in great measure passed to favourites and private persons, whilst the burden of relieving the poor now devolved in an increased degree upon the parishes, to become again, in a uniform distribution, a burden upon real property.

On that very account the legislation unswervingly adhered to the direction it had once and for all taken. It is true that the act 1 Edward VI. c. 3, passed under the nobles' protectorate of the minor King, recurs to the most barbarous coercion of able-bodied beggars, who are threatened with branding, slavery, and death, but after the lapse of three years the more merciful law of Henry VIII. was restored. According to 5 and 6 Edward VI. c. 2 the collectors, on a particular Sunday in the year, immediately after service, "shall put down in writing how much each man was willing to contribute weekly for the following year," and if any one should be obstinate, the clergyman should exhort him kindly, etc. The stat. 5 Elizabeth c. 3, however, strengthens the "kind persuasion" of the clergy by a writ of summons to appear before the next sessions of the peace, and the justices of the peace are again to urge him kindly, and finally, if he refuses to be persuaded, to assess him at a proportionate contribution for the poor, and in case he then refuses, to put him in prison until he pays. By 14 Eliz. c. 5 the justices of the peace were generally empowered to assess the inhabitants for contributions, and, in case of necessity, to exact these contributions by imprisonment. At the close of the sixteenth century the alarming increase of professional beggars and vagrants led to the appointment of a committee of the

Lower House, to which, among others, Sir Francis Bacon belonged, to take into general consideration the necessary measures of public charity, of enforced employment of paupers, and of the punishments to be inflicted for mendicity and vagrancy. Relief of the poor and police had formed for generations a connected and inseparable system, embracing under four heads (1) police punishments for mendicity and vagrancy; (2) the compulsory obligation of the working classes to go to service, to which were added somewhat later (3) the institution of workhouses and houses of correction; and (4) a system of public charity through the medium of the parishes. (2<sup>a</sup>) The result was six connected laws, all important for the parochial administration, of which only the statute 39 Elizabeth c. 8 belongs here, as it contains the outlines of the pauper legislation in a narrower sense, which comes to an end with the reign of Elizabeth. (2<sup>b</sup>) The stat. 43 Elizabeth c. 2, which

(2<sup>a</sup>) The original ecclesiastical legislation made, as is known, four portions according to which the tithe should be distributed. In England, as a rule, only a threefold division is spoken of, as the endowment of the bishoprics had been very plentifully provided for in another way. Therefore one-third was to be employed for the *fabrice ecclesie*, one-third for the poor, and one-third for the clergy. Sensible gaps were caused accordingly by the secularization of the convent estates under Henry VIII., and still more by the confiscation of the property belonging to the guilds and hospitals under Edward VI. But according to the tendency of the writer the importance of the monasteries for the relief of the poor was frequently overrated. Hallam justly remarks, on the other hand, (Const. Hist., i. 108), "There can be no doubt that many of the impotent poor derived support from their charity. But the blind eleemosynary spirit inculcated by the Romish Church is notoriously the cause, not the cure, of beggary and wickedness. The monastic foundations scattered in different countries could never answer the ends of local and limited succour. Their gates might, indeed, be open to those who knocked at them for alms. . . . Nothing could have a stronger tendency to promote that vagabond mendicity which severe statutes were enacted to repress." The Church and the monastic institutions lacked in the form they had assumed the necessary staff and the money for an effectual relief of the poor. In the

altered condition of society the relief of the poor could be no longer separated from the police of the poor. Only by the temporal legislation and by the co-operation of the parishes was the bare police system capable of being effectually blended with the humane measures of pauper-relief; and the first only remind us still too vividly of the whole of the barbarity which, with so much that is great, pervades the temporal institutions of the Middle Ages. According to 27 Henry VIII. c. 25 lazy vagabonds were to suffer the extreme penalty of the law, "as felons and foes of the commonwealth." According to 1 Edward VI. c. 3 every able-bodied man who will not devote himself to any honest labour, and will also not go into service, shall be branded on the shoulder as a vagabond, and shall be assigned as a slave to any one who will have him, to be kept by him for two years on bread and water. If he absconds he shall be adjudged as a slave for life, and if he again runs away he shall suffer the extreme penalty of the law as a felon. This was repealed by 3 and 4 Edward VI. c. 15. But in 14 Elizabeth c. 5 the rule was again inserted, that rogues, vagabonds, and sturdy beggars should suffer capital punishment if they repeated their offence more than once. It was only upon the consolidation of the whole legislation affecting paupers and the supervision of labourers that these barbarities disappear.

(2<sup>b</sup>) The consolidated social and political group of laws of 39 Elizabeth



has for more than two whole centuries regulated the English poor-relief, is only a new version of this law. The leading principles of the great poor-law are—

1. The relief of the poor is the general and uniform burden of each parish. But the pauper has not the free choice of applying to any parish at will, for the former laws remain in force, according to which persons who cannot or will not work are compelled to remain in the same parish in which they are domiciled, *i.e.* in which they were born or have lived for the last three years. This contains at the same time the basis of a right of settlement; yet in such a manner, that the poor, according to the wording of the law, find a bare subsistence in their present place of abode, and that a removal to their parishes only take place in the case of rogues and vagabonds. (a)

2. For the personal functions of this poor-relief the parochial office of *Overseers of the Poor* was created. In every parish the churchwardens are to be primarily the guardians of the poor, and in addition to them two or more overseers of the poor, who are to be appointed annually by the justices of the peace from among the well-to-do residents. These overseers of the poor are to adopt measures for the employment of all persons, who without having the means of living, are engaged in no regular trade or business for the gaining of their sustenance. To this end they are empowered "to raise such sums of money as they shall require for the purpose of providing a sufficient supply of flax, hemp, wool and other goods or stuffs, in order to employ the poor; as also the necessary moneys for the support of lame, blind, and old persons and such as are unable to work, and for the placing out of their children as apprentices." Persons who refuse to work, they can send into a workhouse or prison,

is, for the time in which it was framed, a masterpiece; cap. 1, *against the decaying of towns and houses of husbandry*; c. 2, *for the maintenance of husbandry and tillage*; c. 3, *for the relief of the poor*; c. 4, *for punishment of rogues, vagabonds, and sturdy beggars*; c. 5, *for erecting of hospitals and working houses for the poor*; c. 6, *touching lands given to charitable uses*; c. 12, *concerning labourers*. Two centuries of parliamentary legislation have not been able materially to improve upon any essential rule of Elizabeth's poor law. As to the final result of the long experimental course of legislation, the earlier steps have been in later time wrongly forgotten. Lambard, Coke,

and Dalton pass over the old statutes before Elizabeth in a manner that tears asunder the historical connection of the parochial system. From ignorance of the old conditions of things, in England also the very well meant but ill-considered advice is repeated at the present day, namely, to leave the whole of poor-relief to "the Church."

(a) The districts of the poor-law system are in principle the parishes. The later legislation of the restoration yielded, however, to the desire for separation, and left it to those interested to divide the parishes and to organize for the smaller unions, so far as they are suited for the purpose, a separate system of poor-relief.

and they may also build a separate poorhouse for the poor of the parish who are incapable. (b)

8. For the purpose of raising necessary means for the relief of the poor, the law empowers the churchwardens and overseers of the poor "to raise the necessary sums by the assessment of every inhabitant, incumbent, vicar, and others, and every owner of lands, houses, and tithes, etc., in the said parish," by which a parochial *poor rate* was legally constituted. The basis of the new demand is accordingly the Christian household as such, just as in the already long existing church rate, and includes every occupier, whether his house consist of freehold or copyhold, in permanent or temporary possession, rent or tenure; and also those living beyond the boundaries with their real estate. Thus arises a complete fixed tax, which was destined to become the basis of all parochial taxation. (c)

III. In a like spirit the burdens of maintaining the *highways and bridge-building* were provided for by the Tudor legislation. The *trinoda necessitas* was regarded as a common burden even in the Anglo-Saxon State, in which the old popular array, which had sunk down to the position of a *posse comitatus* of peasants, was employed on such services. The Norman period enforced the keeping in repair of the highways and bridges by the ordinary police fines, viz. amerciaments. The widening, alteration, and closing of highways was regulated by an order

(b) The appointment of overseers of the poor was made according to Elizabeth's law by the justices of the peace. This must be regarded as an innovation. When the older law of 27 Henry VIII. c. 25 left to the parishes the duty of providing for the employment of able-bodied paupers, and helping those unable to work, by the churchwardens or two others, it was naturally left to the parish to appoint their agents on their own responsibility. The reasons for Elizabeth's innovation were that it was thought that by means of this appointment the very unequally distributed and faulty system of relief could be better carried out, and that an appointment by the public magistrates was considered more effectual in the case of a new burden which had been introduced in the face of some opposition. Later practice took a medium course, by giving the vestry a right of proposing and treating the appointment by justices of the peace only as a confirmation.

(c) The creation of the church rate in Elizabeth's law is the fusion of the

former attempts into a uniform system. The Church had always acknowledged the liability of the clergy in respect of their tithes. According to the *Instructions* of 1547 and 1559, "all parsons, vicars, prebendaries, and others having livings, if they do not reside upon their livings, shall, provided they have annually £20 or more to spend, for the future distribute among the poor parishioners or other inhabitants, in the presence of the churchwardens or other honest men of the parish, the fortieth part of the fruits and income of the said livings." From this point of view the mention of the parson or vicar among the first of those liable to contribute, and the particular prominence given to the tithes as objects liable to taxation is explained. So long as Elizabeth's law was enforced in its original sense by the "industrious employment" of the poor, the total mass of poor rates appears to have remained within moderate limits. According to statements of Coode and Nicholls it amounted in the year 1650 to £188,811.

issuing from Chancery, a writ *ad quod damnum*, by which the sheriff was instructed to determine by means of a commission of inquiry, whether the proposed change would not be prejudicial to the public. The keeping of ways and bridges in repair was a constant object of debate in the sheriffs tourn and in the court leet. An appropriate division was made of this duty, by which the burden of the highways was incumbent on principle upon the small villages, whilst the more onerous burden of building and repairing the bridges fell upon the whole county. Actual use by the public rendered all the inhabitants liable to the work of repair (Coke, Inst., ii. 700). These principles, as they had been formerly uniformly applied by the Norman administration, were regarded as "common law." Their maintenance depended, according to the police practice of Norman times, upon a procedure by indictment, and primarily indeed by presentment before the King's Bench, the itinerant justices, or the criminal assizes. The sheriff could by a commission be charged with this duty, until by 28 Edward III. c. 9 this part also of his judicial functions was withdrawn from him. Besides this there lay an ordinary indictment by private persons against the responsible parish. By 22 Henry VIII. c. 5, sec. 1, presentments before the general sessions of the justices of the peace were allowed to be of equal effect with those laid before the assizes. Last of all, a financial criminal information *ex officio* could be laid before the common law judges.

The Tudor legislation practically simplified and supplemented these principles. The Statute of bridges (22 Henry VIII. c. 5) imposes the duty of contributing to the bridges upon all householders, whether they possess lands or not, and upon all real estates, whether their owners live in the county or not. The troublesome and inadequate procedure by indictment leads further to the formation of a new parochial office (according to the principle of the division of labour), that of *Surveyor of Highways*, by 2 and 3 Philip and Mary c. 8. To this officer of the parish is now transferred the primary duty of keeping the highways in repair, and, with this object, he is empowered by the statute to make liable to manual and cart services, in proportionate gradations, according to the extent of their real estate, all the inhabitants, landowners, as well as the possessors of a team, householders, as well as cottagers and labourers with their own households. Thus the same bases of a parochial constitution were laid, as in the case of the poor-law system, namely, the parish as the district; the surveyors as local officers, elected by the members of the community liable as responsible representatives of the communal-duty; performance in kind in propor-

tion to the size of the household and the real estate, which in later times was gradually changed into a money rate according to the scale of the poor rate. (8)

Closely connected with this reconstruction of the highway liability are the highway police regulations. According to the older highway statute the courts leet are to inquire into all offences against the statute and inflict fines and amerciaments. In case they neglect their duty, the justices of the peace shall hold inquiry at the sessions. But according to 5 Elizabeth c. 18 every official information of a justice of the peace touching a "highway out of repair" shall have the force of a presentment by twelve men, and on the ground of this "conviction" the penalty shall be immediately inflicted. A police regulation affecting the breadth and clearance of the highways had been already contained in the statute of Winchester (18 Edward I. c. 5). By 5 Elizabeth c. 18 these provisions were specialized, and became still further specialized into highway regulations touching lighting the roads, keeping them dry, sign-posts, milestones and the removal of nuisances of all kinds, the enforcement of which now pre-eminently devolves upon the justices of the peace. Already, by the statute of Winchester, the constables were to make periodical reports as to the state of the highways, which duty in later times passed to the surveyors of highways.

A somewhat different, though in many respects an analogous, course was taken in the arrangement for water communication. Regulations for harbours and navigation were connected with the old constitution of the so-called Cinque Ports. A lighthouse and pilot code follows under Elizabeth, simultaneously with the formation of privileged corporations for

(8) The highway statute 2 and 3 Philip and Mary, c. 8, graduated the parochial burden in this manner: every possessor of an acre of land has at a given day or place to provide a waggon or a cart, drawn by oxen, horses, or other beasts of draught, according to the custom of the county, together with two able-bodied men and other requisite utensils. Every owner of a team or plough in the parish has also in like manner to provide a waggon with two men; instead of the waggon, on demand, two men must also be provided. Every other inhabitant, householder, cottager and labourer who is able to work and who is not in a domestic relation of annual service, must on the same day do manual service either in person or by an able-

bodied representative. Persons of the middle class (forty shillings annual rent from land, £5 in personal property) are to furnish two men (18 Eliz. c. 10, sec. 2). The burden of making the highways is therefore still based upon performances in kind. According to 5 Elizabeth c. 18, and 29 Elizabeth c. 5, six working days were fixed by the justices of the peace for the repairing of the roads. But in case the manual work provided by law was insufficient this service did not secure the parish against an indictment for roads insufficiently kept; for the statutes are only made "in aid of the common law" (Dalton, "Justice," c. 26). It was necessary, accordingly, in such a case that supplementary taxes should be raised.

this purpose, for duties and rights of this kind could not well be incorporated with local parochial unions. A similar system was followed in the dyke-unions, which were formed, as the nature of the land required, of the persons interested. *Commissioners of sewers* had been already created in the Middle Ages and were more exactly regulated in the spirit of the older institutions by 23 Henry VIII. c. 5. (8\*)

IV. By the foregoing regulations the *village constitution* and a *new system of parochial rates* became consolidated, depending upon the three following facts:—

The district of this village is the parish, which now thrusts into the background the old tithings and townships with the decaying office of constables. The overseers of the poor and of the highways, the poor rates and highway rates, now form the connecting link between the ecclesiastical parish and the temporal State.

In the system of parochial offices, those of the churchwardens and overseers of the poor are, in the first instance, intentionally associated together—a practical expression of the “non-separation” of Church and State. In their church functions the churchwardens are subordinated to the ecclesiastical authorities, and, in the poor law administration, to the temporal magistrates (the justices of the peace), moreover with rights and duties similar to those of the overseers of the poor. The right of the parish to elect its churchwardens continues as a popular elective element side by side with the right of the justices of the peace to appoint the overseers. The right of the parish to vote the parochial taxes for the church rate, and the right of the overseers of the poor to levy a tax for the poor rate, mutually modify each other by constraining to harmonious working. Somewhat less important appear the offices of overseers of the highways and the constables.

The parish rates from this time gain a much increased importance. The demands made upon the commonwealth were in the Middle Ages simple, so long as the labouring classes were included in great numbers in the larger households. The village system in the Middle Ages embraced,

(8\*) The commissions of sewers are regulated according to other principles. The keeping of the drains in repair is the permanent interest of the land and not of the parochial union as such. The necessary contributions for this purpose, *sewers rates*, were by law charged to the endangered landowner as such (6 Hen. VI. c. 6), and not to the occupier, like the parish rates. The necessary magisterial powers were given

by a royal commission. The commission forms a court of record, that is, a court with discretionary penal and executive powers, and proceeds according to circumstances by inspection or with a jury, either according to the custom of the dyke-unions or according to need and discretion. At the same time it enforces by summary penalties the police regulations it decrees.

moreover, only functions in which personal service and performance in kind predominated (such as militia, courts of law, police, and making of highways). To the modern parochial system finance was also added. The church rate was indeed still often raised in a patriarchal manner for certain church purposes, by the levying of a poll tax of one penny; the poor rate, on the other hand, was a considerable, uniformly levied rate, exacted by the overseers of the poor. Such was also the bridge rate. The making of highways was still managed by performances in kind, but they are essentially incumbent upon the same class of occupiers and landowners. The system of a parochial taxation, which is based upon the household according to the scale of the visible profitable property in the parish, is thus the ordinary type of all parochial taxation. Certain deviations from it in the church rate, in the burden of making the roads, and in the police contributions were easily ignored, as the differences were scarcely worth mentioning, and their correction would have involved a disproportionate elaboration of accounts. The poor rate could still be regarded as the regular tax, and all else merely an appendage and addition to it. Legal analogy, simplification of the business of assessment, the habituation of the ratepayers to it, and the common exercise of the functions of a court of higher instance by the justices of the peace, all worked together to bring all local rates by degrees under the same category as the poor rate.

In consequence of all these manifold duties which devolved upon it, the parish has gained a stirring life, and with it also the energy for new formations, which appear in the form of parochial committees for parochial purposes. The committees of assessment date back to the Middle Ages. Beside them there now appear *committees of jurats*: that is, four or eight arbitrators appointed on oath for the amicable settlement of disputes between neighbours. Frequently a kind of parochial administrative council, a *committee of assistance*, is mentioned, consisting of thirteen persons, who have formerly been churchwardens or constables, and who afterwards formed the later so-called *select vestries*.

From the whole system of the new organization there sprang up further a right to make by-laws, a right which at first proceeded from the practice of the court leet. If the parish undertook the levying of public and constitutionally recognized contributions, such as the church rate, or if it fulfilled legal obligations, such as making roads and relieving the poor, it was also to be empowered to make rules for the "better fulfilment of them." In this spirit the judicial practice in early times recognized the resolutions of

the majority as having the binding force of law: "By-laws for the reparation of the church, or a highway, or of any such thing which is for the general good of the public" (Coke, Reports, v. p. 63a). The condition was, however, here observed, that no rate should be raised but for such legally authorized purposes, or for such as, like the church rate, were based upon old custom and indirect recognition of the law, and that nothing might be enacted which was against the common law.(4)

All these institutions taken together determined the powers of the vestry. A constitutional right of being consulted resided in the parishioners only in the case of the church rate, owing to the circumstances of its origin. To this right was added a similarly acquired right of electing churchwardens, or at least one of them. A right of electing the surveyors of the highways had been already given by stat. 2 and 3 Philip and Mary. A right of proposing candidates for appointment as overseers of the poor was naturally added. A right of proposing or electing the constables belonged, according to time-honoured custom, only to the court leet, and this latter, which was dependent upon special privilege, includes a different circle of persons than the parish, and falls into decay after the fifteenth century. A right of electing the constables, based upon principle, could under these circumstances hardly appear. Many questions of local government were, however, naturally brought up by the

(4) For the consolidated parish constitution of this period the treatise of Toulmin Smith, who with personal predilection undertook the unearthing of the parochial system, which had been almost buried in the eighteenth century, is a most valuable work ("The Parish, its Powers and Obligation at Law," London, 1857, 8vo.). Nor are the historical merits of the work diminished by various one-sided legal views, which were sure to arise from the contrast to the habitual disregard of the local parochial life and to the modern centralization. Among these errors the principal one is the over-estimation of parochial autonomy. The right of making their own by-laws, and the right of self-taxation only existed in England for objects and purposes, which were entailed upon the parish by law as a common obligation. The judgments quoted by Smith, taken together, refer to the older law which required that the police fines to which the members of the community had rendered themselves liable should be

raised by the community, and the subsidies voted in Parliament apportioned amongst them (Smith, 558, 563). Of the greatest interest is the constitution of the committees, which were organized as they were required. Committee of jurats (Smith, 229); committee of assistance (229); committee of watch and ward (230); committee for assessment (230); committee for raising and distributing poor relief, for audit, of destruction of vermin (230). This laborious parochial government was the means of bringing about many village festivities, concerning which the Bishop of Bath announces on the 5th of November, 1663, that his parochial clergy are of opinion that such village festivities should be retained (Smith, 499, 500). Such ecclesiastical, judicial and other feasts occur under the name of "ales" (as among the German peasants, the "*Kindelbier*," etc.), and are known more specially as bridge-ales, church-ales, clerk-ales, give-ales, lamb-ales, leet-ales, midsummer-ales, Soot-ales, Whitsun-ales, and others.

officers for discussion before the parish, without a legal obligation to do so. From the time of the Stuarts, the development of these customs was certainly different in different places. Where a wealthier class of tenants or freeholders existed in country parishes, and agricultural husbandmen in the borough parishes, such open vestries busied themselves pretty actively with parochial affairs. In other places the active participation in such affairs was limited to an old committee of parishioners or an administrative council of former overseers of the poor and constables, which easily filled up its number by co-optation. After a few generations this institution appeared, under the name of a *select vestry*, as an established custom. Again, in other places everything was restricted to the annually appointed and chosen officers. In such matters political leanings have had less influence than local exigencies and convenient custom.

V. The newly constituted parish now becomes immediately connected with the county police administration, and especially with the county magistrates, and, through the justices of the peace, comes into further connection with the central Government.

The legislature, immediately on the constitution of the parochial system, took care to form a court of higher instance, as well in the case of the taxes as in that of the local government. In the case of the taxes this was most effectually brought about in the matter of the poor rate. Two justices of the peace approve the rate assessed by the overseers of the poor. Two magistrates of the same class may, if the parish shows itself incapable of maintaining its poor, assess another village within the hundred to supply the deficiency; and if this also is not sufficient, the quarter sessions shall assess a parish within the county "to make it good." The quarter sessions decide the appeals against the rating. Two magistrates issue the writ of distrain, if execution is resorted to. Two magistrates receive the accounts of the retiring overseers of the poor, and enforce the delivery of the amounts if necessary by writ of execution, subject to an appeal to the quarter sessions. The quarter sessions assess every parish at a proportionate rate for needy persons in the prisons and hospitals. By orders of the magistrates questions of the right of settlement, of conveyance of paupers to their parish, and compensation for disbursements arising between the several parishes are decided. In the province of the management of the highways they fix the working days for repairing the roads, decide appeals, and afterwards levy the necessary supplementary tax, should such be needed,



according to the scale of the poor rate. In the case of the bridge rate, the imposition is made immediately by the quarter sessions.

In the department of the local government, the appointment of the overseers of the poor is, in the first place, made by two justices of the peace. Two magistrates enforce by fines the holding of monthly sittings, and by the penalty of imprisonment the presentation of an annual account. Two magistrates approve the industrial employment provided by the overseers for the parish poor. By the order of two magistrates, the poor are kept at forced labour, are compelled to serve apprenticeship, relatives are summoned to contribute to the support of destitute persons, and the father for his bastard. The magistrates may in urgent cases order relief for a needy person. They compel by penalty the overseers of the poor and the constables punctually to fulfil certain official duties. The quarter sessions, finally, are the general court of appeal for "all persons who feel themselves aggrieved by any action or neglect of the churchwardens or overseers of the poor" (48 Eliz., c. 2, sec. 6). For the surveyors of the highways, whose appointment is in this period still made by election by the parish, the quarter sessions, together with individual justices of the peace, form the controlling court of higher instance for the due carrying out of highway regulations, and they decide in their sessions legal points which may arise. The management of the county bridges is the immediate province of the quarter sessions. The subordination of the constables and their duty to appear periodically at the sessions to make their presentments, and to report upon the state of the roads, was a relic of the old police system. With the decay of the court leet the appointment of the constables passed more and more to the board of magistrates, and from the right of appointment arose in practice also a right of dismissal. The coroners were by 1 Henry VIII. c. 7, rendered subordinate to the magisterial power of inflicting penalties for breach of duty. Only the churchwardens are subordinated to the justices of the peace purely in their capacity of guardians of the poor.

As the local officials were in all matters made responsible to the magistrates, so also by the subordination of the office of justice of the peace to the central administration, that unity in the administrative system was attained, which, in the continental States was only technically developed somewhat later by the formation of a "*Staatsrath*" and "*Behörden-system*" for the provincial and district government. The police control, especially that of the police for trade, labour, and order, the State and parish taxation, the militia system,

and that of all other more important branches of the temporal administration, had now been thoroughly regulated by statute and ordinance, and the councillors of the Crown were now regarded as responsible to the King and to Parliament for the due execution and maintenance of this legal order. It was necessary, therefore, to allow the Privy Council and its delegates the means for conducting the government of the country according to these laws. The governmental system of the Tudors had accordingly already carried out the system of administrative control of modern government in all its three functions.

1. A disciplinary or penal power for breach of the law over the persons of the magistrates, sheriffs, and military commissioners, and through these over the constables and all other executive officers of local government, is effectually exercised by the right of dismissal of all these officers, who from the Lord Chancellor down to the village constable, are revocably appointed (*durante bene placito*). Beyond this, however, there extends also a right of inflicting summary punishment, such as from its origin in the Anglo-Norman era (*supra*, p. 160) had never been given up by the kings. As this right had in the preceding period been even put into execution against the members of the common law courts, and had only gradually fallen into disuse on account of the honour of the permanent judicial office, so did the exercise of it by the itinerant justices, and in consequence by the magistrates, who had taken their place as permanent *custodes pacis et iusticiarii*, become a more and more natural consequence. It is, accordingly, in fact, only a declaration of the existing system, when the statute (8 Hen. VII. c. 1) touching the Star Chamber reserves to a select committee of the Privy Council a penal jurisdiction over all abuses of office of whatever kind. It was only a declaration, when in 4 Henry VII. c. 12 the King issued a solemn address to the magistrates, exhorting them to the faithful exercise of their office, if they would avoid his highest displeasure, and under threat of immediate removal from the commission and punishment for disobedience. That this penal jurisdiction was comparatively seldom exercised, was only a consequence of the more simple and effectual right of dismissal.

2. A power residing in the central administration, controlling the orders and precepts of the magistrates, was a result of their position as delegates of the royal judicial and peace powers. As this had always existed for the measures of the itinerant commissioners, it was natural that this power should, as a reservation of a continual intervention on the part of the royal government, *supplendi et corrigendi*

*causa*, proceeding from the Privy Council as well as from the King's cabinet, be equally valid in the case of this permanent commission of magistrates. Hence followed in the first place the obligation of the local commissioners to make report (*certiorari facias*), and to obey the direct mandates issuing from court. In like manner it was one of the functions of the itinerant justices of assize, in their character as the highest *custodes pacis*, and as representatives of the central courts (as which they had been regarded since Henry VI.) duly to instruct the magistrates, to warn them, and threaten them even with deposition and punishment, as very often happened. In fact, there was only too urgent cause found for exercise of this supreme jurisdiction, in consequence of the partiality and demoralization in a generation, which had grown up amid the party struggles of the Roses, and which continued under the party struggles of the Reformation. All proposals of Parliament for the abolition of the abuses and mistakes of the administration gained their effect only through these corrective powers of the King and the royal council, which controlled the magistrates, the sheriff, and the local boards.

3. This controlling court becomes of itself a double legal remedy, that is, as a court of appeal for the protection of subjects, so soon as it exercises its jurisdiction on the motion of corporations or private persons. The innumerable petitions of private individuals addressed to the King and the royal council, as well as to Parliament, presuppose that the King and the royal council can and ought to interfere *corrigendi causa* with the orders and measures of the county and local administration. Its existence as an administrative court of higher instance is an especial presupposition of all parliamentary action with regard to national grievances. If, accordingly, the historians of this period as well as the Parliaments complain of the severity and impartiality of certain measures of the Privy Council, any denial of the principle of these corrective powers is perfectly alien to the Tudor period. (5)

(5) A disastrous error has been committed by modern historians, and in particular by Hallam, in portraying this character of the royal council as a disciplinary, controlling, and appeal court, in the light of attacks and encroachments of the Privy Council. This notion is perfectly foreign to contemporary historians, Parliaments, and jurists; it is rather the result of a dating back of conditions belonging to the eighteenth century. When Lord Coke (*Inst.*, iv. 17) declares the extension of a "punishment" of dis-

obedient magistrates in the Statute 4 Hen. VII. was a natural presupposition of the ordinary course of law in an action, this was a pious wish of the honourable Lord Chief Justice, which could not be enforced against the Privy Council, and of the fulfilment of which no instance is known. It was not until the period of the Stuarts that after severe abuses of the royal power, upon the one side the administrative controlling power and court of appeal of the royal council (cabinet) was almost abolished (*vide*

From this building up of an administrative system from the parish to the Star Chamber and to the King's cabinet, it results that the permanent constitution of the common law courts could only in a limited degree guarantee the legal rights of individuals; that, on the other hand, whilst the personal will of the King and of the Privy Council in the Star Chamber could to a great extent prevent injustice and partiality, they could also themselves inflict these evils, so soon as an exercise of the royal power in a monarchical spirit ceased, as was the case after the death of Elizabeth. With the period of the Stuarts, accordingly, Parliament begins to aim at restricting the supreme administrative power. In another direction it is apparent, that the judicial independence which resides in the honorary officers of *self-government* by virtue of their possessions, contains the requisite energy to resist a despotic government. Finally it becomes gradually apparent, that the cohesion which the lower strata of society have gained by the local constitution of this period, both in Church and State, has engendered a manly spirit which is able victoriously to face the constitutional struggles that ensue against absolutism in Church and State.

*infra*, chap. 1.); whilst in other directions a feeling of judicial independence and of judicial duty all together had become developed in the magisterial bodies, hand in hand with the now recognized irresponsibility of the jury. In Toulmin Smith this conception rises to such a pitch that in his over-zealous local patriotism for the parish he regards the appellate jurisdiction of the justices of the peace, of the Privy

Council, and of the Parliament, and even the whole of the parliamentary legislation as almost a usurpation practised against the autonomy of the parish, as a false "parliamentarianism" compared with the good old common law. As if a modern State were conceivable without administrative laws, and as if administrative laws were conceivable without a thorough control exercised over their due execution!

## FIFTH PERIOD.

## THE STUARTS AND THE CONSTITUTIONAL CONFLICT.

## CHAPTER XXXVII.

*The Discord within the Political System.\**

JAMES I., 1603-1625  
 CHARLES I., 1625-1649  
 THE REPUBLIC, 1649-1660

CHARLES II., 1660-1685  
 JAMES II., 1685-1688

THE English Reformation had made the monarchy the sole heir of the papacy. Though, with the abolition of the long-disputed foreign supremacy of the Italian Head of the Church, an important step had been taken towards the emancipation of the intellect, at the same time a serious step had been taken towards imperilling the national constitution. The

\* For the period of the Stuarts, the wealth of sources and literature is so great that only a selection need be given. The Statutes of the Realm, vol. iv. a, v., vi., vii. a, contain the legal records of this period. For the period of the Commonwealth as supplementary to these: "Acts and Ordinances during the Usurpation from 1640-1656," by Henry Scobell (London, 1658 fol.). The Parliamentary proceedings are given in fairly detailed extracts in Parry, "Parliaments," pp. 240-603 (1839). Among the historical descriptions the most prominent is the brilliant description in Macaulay, "History of England." Cf. also Hallam, "Const. Hist.," vols. i., ii. For voluminous matter: Rushworth, "Historical Collections from 16 James I. to the Death of Charles I." (1659-1701). The constitutional law questions of the revolution are treated of in Clarendon, "History of the Rebellion" (Oxford, 1705), Brodie, "Constitutional History

of the British Empire, from the Accession of Charles I. to the Restoration" (new edit., 1866, 3 vols.). Burnet, "History of his own time from the Restoration," etc. Guizot, "Histoire de la Révolution d'Angleterre," "Histoire de la République d'Angleterre," and other writings. Dahlmann, "Englische Revolution." Ranke, "Englische Geschichte," vols. i.-vii., principally dealing with foreign affairs. As to the political polemical writings of Hale, Prynne, Selden, Brady, and others, cf. R. von Mohl, "Die Literatur der Staatswissenschaft," vol. i., pp. 325-380; ii. 70 seq., 86 seq. Cf. also particularly Sir Roger Twysden: "Certain Considerations upon the Government of England," edited by J. M. Kemble (London, 1849, 4to). More modern treatises: J. Langton Lanford, "Illustrations of the great Rebellion" (London, 1858). Vaughan, "Revolutions in English History" (vol. iii. 1863).

contrast which had so long and so deeply moved the Middle Ages had thus become planted in the heart of the constitution. Until the period that now commenced, the boundary between Church and State had been guarded by national jealousy; now the barrier between the two had fallen, for both had become united under a single sovereign lord. The two tendencies of the human mind, which had hitherto embodied themselves in Church and State, had now become internal contrasts in the State itself.

According to the time-honoured popular idea there was only one Church. But the living generation found itself involved in a bitter controversy as to which Church was the true Christian Catholic Church. The possibility of each being equally entitled to be so regarded, or even of a toleration of different creeds within one political system, was as yet quite alien to the ordinary ideas, and was in fact impossible, so long as each Church regarded the right of solemnizing marriages, and all the important bases of private family institutions, as well as public education and numerous other legal conditions of family life as the subject of its exclusive legislation and jurisdiction, subject to the ecclesiastical coercive control, which like every other political power, could only be a concentrated and exclusive power.

The Roman Catholic Church, where she had the power, enforced this view of her right by fire and sword. She had strengthened herself in the sixteenth century by serious reforms and by strong alliances. The Pope, and the Catholic potentates of the Continent, kept up an agitation by means of emissaries, by entering into conspiracies and by releasing the English subjects from all obedience to the English throne and supremacy. Such opponents could not be combated by endurance. The scenes on Saint Bartholomew's day in Paris, and those which took place in the Spanish Netherlands, made abstract toleration in the sixteenth century an impossibility. The Crown of England was not able to protect and maintain the national Church in any other way than by constituting it the only true, and the sole rightful Church both in the eyes of God and of the law; it could only uphold the greater Christianity of the new faith, by exercising its right of constraint in a more moderate and more human fashion. The attitude of the Crown towards the old Church was thus indisputably established.

But as early as the second half of the sixteenth century, differences began to spring up in another direction within the reforming party itself. The idea of a mere national Church, without change of dogma, had under Bloody Mary been proved to be utterly worthless. The monarchy was obliged to

confess that the new work, without inner conviction, had no hold, and that in many parts of the country the reform had not as yet been understood. Therefore, in spite of serious scruples, it had been necessary to resort to the peculiar weapon of the Reformation, the licence to read the Bible. The effect was, that the people began to expound the so long prohibited Bible with that kind of prejudice "with which an English jury is wont to regard evidence, which one party in the action has endeavoured to suppress." With examination and inquiry doubts now arose in individual minds as to the new hierarchy. Simultaneously with the dogmatic reformation under Edward VI., disagreements appear between the more moderate reformers, who are satisfied with the doctrine and liturgy established by authority, and those stricter reformers of the school of Zwingli and Calvin (analogous to the controversial points between the Lutherans and the Reformed Church), and nourished by intercourse with the reformed clergy on the Continent. The Government itself had held up the Roman Church with its external pomp, its miracles, its relics, and its traffic in indulgences to ridicule and scorn. With the permission to read the Bible, there was added to the mistrust of the authorized teachers of the Church the charm of personal research and the national characteristic of striving after individual independence. Both schools held to the opinion that holy writ was alone sufficient, not only in matters of faith, but also for discipline and the honour of God, and that each individual had a right to interpret the Scriptures independently according to his own lights and his own conscience. But a further result was, that the legality of Convocation, as well as the authority of the *canones*, was disputed, and in this manner opposition was directly introduced into the State. A fruitful soil for this personally honourable opposition was found in the rising classes of the yeomanry, the citizens, and a part of the gentry, but especially in a part of the theologically educated lower clergy. As is ever the case, the ideas of social classes blend with those of the religious, and, according to the degree of influence the latter exercise, dissent takes the form of a Presbyterian constitutional ideal, or inclines into the more thorough-going tenets of the later Puritans, or finally to those of the Independents, who deny the Church as an institution, and desire to make the clergy elective parochial officers, entirely dependent upon their constituents, who elect them. Though these different schools of thought showed themselves in Elizabeth's time only sporadically, and then only in narrow circles, yet they soon manifested themselves in attempts at forming sects and conventicles, in

dissensions between the parishes and the authorized parsons, as controversial points between the parishioners among themselves, and yet more particularly in the manifold differences in the externals of the places of worship and in the form of the service.

From the point of view of the State Church, Elizabeth determined to suppress the irregularities in the Church service which resulted from these causes, to take action against the conventicles, to depose dissenting ministers, and to visit the issue of polemic pamphlets with severe penalties. But, through this course of action, honest conviction was driven into opposition against the royal authority itself; Cartwright, in his bold theses, even disputed the supremacy. "Church matters should," he urged, "only be settled by Church officials and ecclesiastics, entitled, even without the consent of the magistrates, to adopt ecclesiastical ordinances and ceremonies." This opposition was surely not unwarranted, in a work of reformation, which was so external in its starting points, and had remained so long external in its course, as the English Reformation. Elizabeth, however, in thus checking it, followed her religious conviction and her policy. In the deep attachment of the people to her person and in the triviality of the differences between the essential doctrines of faith, this side of the opposition still appears the subordinate one. (1)

But in spite of continual disunion among themselves, the reforming schools remained united in their demand for the creation of a national Church, that is, united in their opposition to the "papists," who were now regarded by the national jealousy in the light of treasonable subjects, who cleaved to a foreign ruler. How Parliament would have acted if left to itself, is shown by certain acts of violence and by ceaseless complaints concerning the leniency shown to papistry. The Crown, by legislation and administration,

(1) The attitude of the monarchy towards the Protestant opposition has not, in historical descriptions, been sufficiently valued according to the scale of the times. Modern tolerance and latitudinarianism would have made the English national Church defenceless and helpless in a conflict with the Roman ascendancy. Unity in its outward organization cannot be dispensed with by a church, even though it be restricted by the executive power of the State to the sphere of an ecclesiastical school and cure of souls. But after the Roman Universal Church had become an exclusive political system, far beyond these limits, ecclesiastical

reform could only find its support in an effectual ecclesiastical authority and in church property, and not in the purely internal nature of the "Churches of the early centuries," which the puritan opposition took as a model. Upon the Continent also the Reformation was compelled to pass from the internal impulse of the heart to external institutions, varying according to the form of the existing temporal state, but ever in close connection with it. Between both one-sided tendencies Elizabeth sought a balance, which actually preserved both Church and State for more than a century from a renewal of a violent struggle.



did its best to suppress the remains of Catholicism; yet from Elizabeth to James II. there was no single time at which the Crown granted as much as Parliament and the popular voice really demanded. All clamoured for coercive measures. In the eyes of the Presbyterians the persecution of the Catholics was not sharp enough; the Episcopalians demanded greater severity against both. All approved such excesses of the Government as were directed against the other party.

In this department of political activity it first became manifest, that the Crown had by the Reformation gained a new independent position, and that its supremacy had altered the character of the prerogative, just as in Germany the position of the reigning potentates had become altered by the so-called *jus reformandi*. In the province of the Church, the King rules as absolute monarch, with a bureaucracy; in the province of the temporal power, on the other hand, only as a constitutional authority, with enacting Parliaments and independent *communitates*. Both systems were in daily contact with each other. But a power that ruled with unlimited sway in what had hitherto been the higher sphere of the Church, felt a natural desire not to be bound in the temporal sphere by the resolutions of the Lords and Commons. As every political power bears within itself a tendency to develop into absolutism, so the monarchy thus gained an inevitable tendency to transform the State into an administrative system after the pattern of the Church.

With clearness and decision Elizabeth had taken up her position under these circumstances. Her government, with the assistance of her council, continually draws conclusions from the royal supremacy. The Act of Supremacy declares all ecclesiastical legislation and jurisdiction to be an emanation from the Crown; the ecclesiastical oath of allegiance uniformly embraces all ecclesiastical and temporal persons holding any public office, down even to the lower and indirect officials and servants of the state. The Act of Uniformity subordinates ritual and Church discipline to the regal power. Later legislation endeavours by supplementary measures to crush rising opposition at all points where it shows itself. (1<sup>a</sup>)

(1<sup>a</sup>) Whether Elizabeth acted rightly in keeping down with such rigour, by her injunctions, the loyal opposition which in the doctrines of faith was arrayed on the side of the national Church,—whether a certain amount of conciliation with regard to the moderate proposals of the Lower House in 1584 would not in some measure have calmed down the dispute,—on these points the

opinions of her own ministers were divided. The experiences made in Scotland were not, however, of a kind to recommend a mild ecclesiastical system of government as productive of peace and concord. In dissenting circles themselves the sturdy manly struggle against error was regarded as inseparable from the serious conviction of the truth. Still less could the

These measures continued to be employed with greater rigour against the opposition on both sides; often severe towards individuals, yet without violating the formal law, which even in the proceedings against Mary Stuart, that were purely determined by political motives, was on Elizabeth's side. With the same sagacity Elizabeth kept within the constitutional limits of her royal power. She knew that her military, judicial, police, and financial sovereignty could no longer be severed from the legally acquired and constitutional participation of the propertied classes; she never ignored the fact that her own title to the Crown was dependent upon secular law and upon the recognition of Parliament. The divine mission of the monarchy, of which she was deeply convinced and fond of speaking, she considered as perfectly compatible with it. With the due recognition of the position and influence of Parliament, she united the newly acquired rights in such a fashion, that (1) in the legislation affecting internal ecclesiastical affairs, she claimed the exclusive initiative for herself and her clergy; (2) she caused the enlarged administrative powers, which the ecclesiastical conflict had called forth, to be sanctioned by acts of Parliament; and (3) in circumstances of war or national disorder she granted extraordinary powers by ordinances, and also granted her officers dispensation from the existing laws. But she made a very moderate use of these powers in cases, for which even the Parliaments of the eighteenth century would not have refused an indemnity bill. She justified reservation to herself of the initiative in the legislation touching internal

powerful opposition made by the Roman Catholic Church be ignored, which, by means of the Jesuit system, had brought about a great alliance of Catholic princes. The necessity for an external union of the English Church was accordingly in no way denied even from this side. What the opposition demanded was not tolerance, but the exclusive acknowledgment of their ideal of church establishment, and having attained this acknowledgment, it demanded uniformity just as much as the national Church. A remarkable expression of the highest views of the time is found in Hooker's work (*"Ecclesiastical Polity,"* 1594), which is quoted in Hallam. Even Cartwright, in his violent opposition to the national Church, demands that the authorities shall punish atheists and papists if they refuse to participate in the true preaching of God's word. Had Elizabeth given free scope to the dissent of

those times, there would beyond doubt have resulted only a divided and still more intolerant church system; a "church of the apostolic era," with still more rigorous principles touching discipline and ritual. Later results have only too completely confirmed this. Elizabeth was not wrong in replying to the Emperor Ferdinand "that she could not grant ecclesiastical toleration to those who disagreed with her religion, being against the laws of her Parliament, and highly dangerous to the state of her kingdom, as it would sow various opinions in the nation, and would cherish parties and factions that might disturb the present tranquillity of the commonwealth." A generation was at least yet required, after the events under Mary, to give the State Church the requisite stability in the institutions of England and the customs of the people.

Church matters, by saying that changes in matters of faith ought not to be brought about by resolutions of the majority, and that Parliament had no traditional rights to claim in this province.

But it lay in the nature of this political government, that such a position did not satisfy many views and interests among the immediate surroundings of the Crown. In the Privy Council, even under Elizabeth, a notion had already gained ground that, in addition to the ordinary prerogative of the Queen, there existed also a "supreme sovereignty," which was also called the absolute power, and from which was primarily derived the legality of extraordinary measures in extraordinary difficulties. The professional bureaucracy was only too ready to look upon every impediment to a government measure as a "difficulty," which could be redressed by the "supreme sovereignty." Proceeding to still greater lengths such conceptions took root among the clerical officials of the State Church of the time. The new position of the bishops as delegates of the royal power had lost its independence as an estate. Their highest court, the Court of High Commission, had become purely a body of functionaries, without either the concurrent enacting powers or the control of an estate, with an ordinary criminal and disciplinary jurisdiction, which is acted and re-acted upon by the machinery of the Star Chamber. The system of these bureaucratic bodies extended still further into great provincial councils. All these courts had adopted the administrative forms and maxims of their ecclesiastical model, that is, of the pure bureaucratic system. It was natural that within this administration new legal conceptions should be formed. Whilst in Germany the modern bureaucracy was the outcome of new legal doctrines, so here new legal conceptions emanated from the already existing official bodies. They coincided with the old jealousy between Parliament and clergy and with the justifiable aversion of the clergy to be subordinated to Parliament, with its varying party-majorities. Through the daily contact of the spiritual and temporal administration, the conceptions of the authority of a spiritual ruler were involuntarily transferred to his attitude towards Parliament and the laity. Whilst the era of the Middle Ages had formed its constitutions not by reflection, but according to the sense of right and interests and by tradition, here for the first time, theoretical systems of the royal right arise, which are formed pre-eminently from theological views and theological polemics. The assemblies of the clergy in both Houses of Convocation, became from this time forth the centre of political doctrines of absolutism. After a few decades the clerical conceptions

were consolidated in the *canones* of the Convocation of 1606, which, however, were not yet published. These theses go back to the origin of human government, which they look for in the patriarchal rule over the family as it appears in the Old Testament. "In those golden days," it was said "the functions of the king and priest were the true prerogatives of the right of birth; until the wickedness of men brought in usurpation and so troubled the clear stream from its sources with foul admixtures, that we must now seek in prescription the right we can no longer ascribe to birth." Deriving thence the doctrine of unconditional obedience to the King's ordinances, it proceeds, "The King's power is therefore from God, that of Parliament from men, gained perhaps by rebellion; but what right can arise from rebellion? Or even if it had arisen from voluntary concession, could the King dispose of a gift of God and break the disposition of Providence? Could his grants, though not void in themselves, be valid as against his posterity—heirs like himself of the great gifts of Creation?" (2)

(2) The new High Church political theories are directly the reverse of the puritan opposition. Henry and Elizabeth had retained the episcopal dignity, not as a sacred *ordo*, but as the ordinary organ of Church government approved by experience. But when the puritan school violently attacked the bishops' authority, the prelates replied by appealing to their "divine appointment." They then followed puritanism into its own territory, by opposing one *ius divinum* to the other, and thus at the same time regained a certain independence from the civil powers. The episcopal office refused to be permanently a mere organ of the civil magistrates. The more the State Church felt itself consolidated the more did its self-respect grow as it remembered the former position of the Church. But the goal was only to be attained by a solidarity subsisting between the divine appointment and the Crown, which latter appointed the bishops. After the accession of the Stuart dynasty to the throne it was perceived that the independence of the Church was less threatened by the Crown than by the Parliaments. The clerical absolutist theory had at all times its roots in the wonted profession of the clergy as instructors. The habit of instructing the laity in spiritual things engenders the desire to impart instruction also in temporal things, in

which the layman understands what is law and right quite as well and even better than the cleric. The demand that the executive should be a "Christian authority," is well founded as being a claim that the State is to obey the commandments of Christian morality, which are one and the same for both Churches, and which should be the mainspring of action in the monarch on the throne as in the servants of the State, as members of their Church. But it does not mean that in an eternally recurring confusion, the clerical body of either persuasion, with its interests of power, property, and party, should sway and guide the central government. In this connection those ecclesiastical recommendations are instructive, with which since the rise of Parliaments amid severe party-struggles and revolutionary changes, the great parliamentary sessions were introduced (such as Stubbs reminds us of in the period of the Middle Ages, and Froude in the Tudor era), and which certainly contain the strongest exhortations to the clergy, not to forsake in their political speeches the domain of universal Christian morality, in order to take immediate part in the constitutional questions of the day. If it was made a reproach to the ecclesiastical opposition, that it had a political background, this was true in still greater measure of the clergy

The fate of the monarchy and the national constitution depended upon the attitude which the dynasty, that came in with the seventeenth century, adopted with reference to these new theories. As the English Reformation had passed from external institutions into the hearts of men, the intellectual conflict of Puritanism with the High Church system, and the struggle of the High Church system with Puritanism were destined to return to do battle in the temporal State. The Stuarts, by taking part with one extreme, themselves drove the other side to resistance, until the King's rule was overthrown. The Reformation began in England in the sixteenth century with an external alteration of the ecclesiastical constitution; it concluded in the seventeenth century with an alteration in the political constitution. The controversy touching the fundamental doctrines of Christianity (such as transubstantiation) had never in England been very bitter. The strife was more heated as to the liturgy and ceremonial. In a fiery form and with a tendency towards violence, it maintained itself in questions touching constitution and power, where the self-government of the Church and the parish clashes with the supremacy and the Court of High Commission, and where the general priesthood opposes the bishops. The English people also have not been exempt from a doctrinal civil war; but the State Church is finally indebted to the passionate violence of the sects for the completion of her internal life, which, in the German Reformation, existed from the outset.

of the State Church, in whom solid zeal for the holy Church now became a holy zeal for the secular power of the head of the Church. Similarly in the bureaucracy of the German principalities, we find underlying the exaggerated zeal for the power of the royal lord, a quiet zeal for the enhanced importance of their own rank. The purely absolutist ideas of the royal power appeared manifest in the pamphlets of the times immediately after

James the First's accession to the throne (*cf.* Cowell's Interpreter, 1607, under the head of *King*). The great indignation, which arose in consequence in Parliament, was calmed by an ordinance of James I., which prohibited this pamphlet. As to the progress of these absolutist theories of the clergy after another generation, *cf.* the *canones* of 1640, and the treatise of Filmer (*infra* 548, note).

## CHAPTER XXXVIII.

**The Conflict of the *Jure Divino* Monarchy with the Estates.**

In this critical state of affairs the house of Stuart ascended the throne, at a time when, upon the Continent, parliamentary constitutions were everywhere coming to an end. That the same result was averted in England is attributable not to the personal character of the Stuarts, and not to the absence of a standing army, but to the legal equality and cohesion of the estates, to self-government, and to the whole substructure of the English constitution. In France, the monarchic power had by its personal influence first to create a "state" and a "nation." In Germany, it was the task of the absolute potentates to blend the several class privileges together into a bare unity. In both countries, the history and the greatness of the monarchy was identical with the struggle against the landed nobility which in England had been already decided in the Norman period. In the lower stage of her development in the eleventh and twelfth centuries, England had passed through the necessary transition period of the absolute State. The strengthening of the royal power under the Tudors was brought about solely by the confusion of the fifteenth century, and was destined only to carry out the national task of the Reformation. After the discharge of this mission, the English monarchy was and remained still a power in itself. It still remained the necessary presupposition of the constitution, the hereditary bearer of the supreme magisterial power, the source of all the privileges of the higher classes; with great duties as the patron of the rising peasantry and the towns, and with still greater duties for raising the labouring classes and the intellectual life, and in the foreign department entrusted with the great duty of intervention for the imperilled Protestant cause in Europe.

But the royal family of the Stuarts had no innate feeling for any of these several duties. Till their time, the history of England had shown the monarchic power almost from generation to generation alternately ascending and descending; now the descending tendency is seen throughout a whole dynasty, during a period of three generations. Scarcely

any family of rulers ever sat on the throne that showed itself so entirely devoid of all sense of royal duty. Their views and mode of action had practically nothing in common with the character of the English monarchy and the English people, but belong to the domestic policy of the family of the Guises and the religious controversies of Scotland. The Stuarts cared no longer for the glory and the greatness of their country, for the victory of the established faith of the nation, for the protection of the traditional common law, nor for the relief and advancement of the weaker classes—but only for the satisfaction of their dynastic will. All aims of this royal race both externally and internally are mistaken. The representation of Protestantism in the great struggle of the century was their external task; but the Stuarts first neglected, and finally disowned it. The reconciliation of the claims of the clerical profession with the opposing spirit of self-government, the strengthening of the national Church, while yet maintaining tolerance towards other creeds, was the internal task which the Stuarts persistently perverted. England had, as a fact, become the antipodes of the whole Roman system. Its European position unequivocally pointed to an energetic development of its maritime power and to a vigorous championship of the cause of the Reformation. Instead of this, James I. became entangled in the net of intrigues of the Continental courts, which was of only secondary importance for England, a net which ought to have been torn asunder by an honest championship of the Reformation. The pedantic perverseness of James I. and the aimlessness of Charles I., could not fail to injure and embitter their relation to their Parliaments. In spite of all the difference in their characters, a negative trait pervades the reigns of all the Stuart kings; it is the want of appreciation of, and respect for, the law of the land. No one of them ever felt himself as representing "England," as identified with the honour, the rights, and the interests of the country. Even their religious convictions were not manifested in a sincere attachment to their national Church, in faithful observance of the oaths they had taken, nor in the exercise of any Christian duty of pardon and grace; but only as controversial weapons for establishing their dynastic pretensions. The Church in their eyes is only a source of regal influence. Their pretended attachment to the nobility of the country merely displays itself in a money traffic for peerages and titles. All noble and systematic provision for the relief of the poor, for education and the advancement of the welfare of the lower classes, all generous encouragement of talent and the sciences ceases with the Stuarts. And if we add to this their want of talent as military leaders, their incapacity to

enter upon any great and permanent political combination, it will be easy to understand how it was possible, in less than a century to destroy the belief of the nation in the kingly office.\*

The first stage in the beginning of the struggle is certainly more like one of those comic scenes, such as in the dramatic masterpieces of Shakespeare precede a tragic issue. In James I. a learned pedant had ascended the throne, unkingly in bearing, manners, and speech, one who seemed to regard the proceedings in the Church and in Parliament as mere rhetorical exercises, in which absolute supreme sovereignty should be taught to unbelievers by ratiocination;—and withal timidly retiring before the first signs of serious resistance, and sacrificing his ministers to the vengeance of Parliament. His whole reign is a weak succession of protests, which did not prevent Parliament from re-establishing the right of impeaching the officers of the Crown, declaring monopolies illegal, and enforcing in the Lower House their own decision respecting elections.\*\*

But what James the First's "kingcraft" failed to accomplish, led to a decisive struggle under Charles I. The encroachments of the *jure divino* monarchy, are all directed simultaneously to

\* The dynastic character of the reign of the Stuarts is unmistakably traceable to their origin. "In the princes of the house of Stuart we see little of the sober Gothic honesty of the lowland Scot, much of the vanity, unsteadiness and insincerity natural to the Italian and Gallic stock from which they came" (Vaughan, iii. 13). In their later domestic policy, which wavered between Spanish and French alliances, it is perhaps most of all their genealogical vanity which makes them swerve from the natural alliance with the Protestant houses. Their attitude with regard to theological questions, was in the first generation determined by the embittered character of the Scotch Reformation. Their later leaning towards Catholicism was in great measure brought about by female influence resulting from their constant alliance with Catholic houses. But the real reason, which caused historians and politicians of every shade of opinion to side against the Stuarts, is the systematic perversion of the monarchical principle in their hands. It is a point often overlooked, that many of their measures were more in harmony with the letter of the law than is assumed according to the standpoint of the present constitution—not unheard of pretensions, but an advance

upon the road which the Tudors had trodden. But whilst the Tudors acted in a dictatorial manner in the full consciousness of their royal duties, the Stuarts insist on enforcing their personal will out of mere idle egotism.

\*\* James I. was possessed of the genealogical croquet which induced the son of Mary Stuart and Darnley to believe that he united in his person the hereditary monarchy of the Anglo-Saxon dynasty, the Norman kings, the Plantagenets, and the Tudors. Much as his aversion to Puritanism and the insipid theological controversies of the period, which resulted from the Scotch religious conflicts, may tell in his favour, yet the decidedly unkingly bearing of this monarch ultimately tended to shake the royal authority. The learning which is displayed in his writings, as in the "*Basilicon Doron*" (intended for his son), in his works upon sorcery, the exorcism of devils, etc., an unmistakable penetration, almost cunning, and at the same time a want of sound judgment as to the affairs which surrounded him, form a marvellously confused character in this curious man, whom his admirers called "*The British Solomon*," and whom the Duc de Sully designated "*the wisest fool in Europe*."



the one practical and decisive point, the abolition of the parliamentary grants of subsidies. These periodical money grants presupposed a constant understanding between the Crown and Parliament touching acts of legislation and foreign policy, with which an absolute monarchy was quite incompatible. The opposition of his first two Parliaments, and their refusal to grant subsidies, was met by Charles I. by prompt dissolution, and by the issue of ordinances to intimidate the opposition. The Star Chamber is made use of for compulsory loans, which were moreover extorted by compulsory billeting of soldiers, the forcible pressing of sailors, and arbitrary arrests. The increasing opposition has, however, soon reached the stage at which intimidation is no longer effectual. The King is compelled by pecuniary necessity to summon a third Parliament, and in this is constrained by the united opposition of both Houses to acknowledge the "Petition of Right," and to approve the declaratory statute (8 Charles I. c. 1), which pronounces all forced loans, arbitrary arrests, and proceedings by martial law as unlawful both in the past and for the future.\*\*\* Up to this point the conflict has retained the character of former periods; administrative abuses and national grievances still continue in the grooves of the old struggles between the monarchy and Parliament.

But the King, with the intention of not keeping his word, after obtaining his subsidy, dissolved Parliament, firmly resolved never again to convene a Parliament. "Ashamed that his cousins of France and Spain should have accomplished a work which he had scarcely begun," he commenced, from March, 1629, a system of personal government, quite new to England, a system which deliberately attacks the foundations of the parliamentary constitution, and introduces new departures into the ecclesiastical and temporal administration, with the fixed purpose of systematically destroying them. The three weapons ready to hand were, the royal ecclesiastical government, the Privy Council, and the appointment of law officers.

1. *The royal ecclesiastical government* had placed the appointment of the supreme ecclesiastical tribunal and of the bishops in the hands of the King for the maintenance of the national Church in the form recognized by Act of Parlia-

\*\*\* The four points of the Petition of Right are: (1) That no freeman shall be compelled to pay any gift, loan, benevolence or tax, without the consent of the representatives of the nation as declared by acts of Parliament; (2) that no freeman shall be imprisoned or arrested contrary to the

law of the land; (3) that soldiers or sailors shall not be quartered upon private houses; (4) that certain regulations touching the punishment of soldiers and sailors according to martial law shall be repealed, and such shall not be issued for the future.

ment. Under James I. the time had arrived when the Church stood no longer in need of that over-rigorous uniformity which, under Elizabeth, had appeared essential to its stability. James I. did not attempt to disguise his idea that the institution of bishops and the episcopal power were pre-eminently designed to accustom subjects to the obedience they owed to their sovereign and to keep them steadfast in it. Charles I., although a Protestant in his personal belief, imagined that he could achieve the development of his spiritual supremacy into temporal absolutism most readily by a return to the standard doctrines and forms of the Roman Catholic hierarchy. This was the object of the Catholicizing reforms of Archbishop Laud, the return to the doctrine of transubstantiation in an ambiguous phraseology, auricular confession, preference of unmarried to married priests, revival of picture-worship, of the crucifix, of gorgeous vestments, of the sacramental altar, and of genuflexions, combined with intolerable vexation and persecution of the puritan sects. By the systematic appointment of men of this tendency to the high places in the Church, the royalist hierarchy and the ecclesiastical spirit of caste was carried to the pitch which is aptly expressed by the *canones* of the Convocation of 1640. (1)

(1) The perversion of ecclesiastical government to political purposes is expressed in James's motto: "No bishop, no King." From the year 1595 the dissenting body had become known under the party name of Sabbatarians, and under James I. the sects had attained considerable proportions. Still, however, a consciousness of a fundamental schism in the political system as a whole did not exist. The collision of the two systems took place in more special departments, particularly in the increasing complaints of the ecclesiastical party as to the frequent interference of the temporal courts with ecclesiastical jurisdiction by means of prohibitions. In 1616 the conflict arose between the Equity Courts of the Chancellor and the courts of common law. In this period the conflict became a class struggle between the clergy and the lawyers. Under Charles I., on the other hand, the ecclesiastical power no longer serves the Reformation, but the extension of royal powers against the Parliament. The Church, which under Archbishop Laud had become Arminian, became the instrument for extending at once the power of the King and of the clergy. The increasing rigour of the Court of High Com-

mission, the persistent persecution of the Puritans, engendered that amount of bitterness which in the course of the civil war bursts forth in this direction. It would seem a special intervention of Providence that in every constitutional conflict it is the most extreme party that is destined to undertake the formation of a counter party. In that most disastrous moment when Charles I. on the 5th of May, 1640, dissolved the moderate "Short Parliament," the ecclesiastics remained assembled to enact those *canones* which declare "every assertion of an independent co-active power besides the royal power to be high treason." The real standard of the High Church theories, however, was just at this time the pamphlet of Filmer, "*Patriarcha*," which was regarded as the keystone of the system. All government, he urges, is absolute monarchy. No man is born free, and in consequence no one can have had the liberty to choose a ruler or a form of government. The *paterfamilias* rules according to no other laws than his own. Kings succeed by right of their parents to the exercise of the highest jurisdiction. They are above all law. They have a divine right to absolute power, and are not

2. *The Privy Council* was destined to sit *in banco*, and with the assistance of the common law judges to conduct the highest business of Government according to the laws of the land, and to supplement these laws in all discretionary points, where the exercise of the sovereign rights was not determined by law, so as to do justice to the extraordinary needs of the State and of society. For the Stuarts these discretionary powers were the fulcrum by which the constitution was to be lifted off its hinges. With this idea the ministers from Buckingham to Strafford proceed in an increasing scale until the utterly unprincipled tyranny, and insolent trampling down of the laws of the land, which characterizes the renegade policy of Strafford is reached. As the domestic policy of the dynasty met with a conceivable impediment in the corporate nature, in the deliberate procedure of the council, and in its legal advisers, James I. had begun to thrust the troublesome apparatus on one side by discharging State business in the King's "cabinet," that is, in small confidential sittings, in which the counsels of the courtiers (his immediate companions) at once became of more paramount influence than those of the responsible ministers. It is the body thus constituted that now, under the name of a royal council, exercises the discretionary powers of the "Star Chamber," powers which had been created for quite different, for legitimate and honourable ends. From this starting-point proceed the police measures, which were necessary for the new system of rule, and which as the opposition increased, became a complete system of banishments, house searchings, seizures, and refusal of the *habeas corpus*. From this centre that method of government was developed, which, to use Clarendon's expression, "commands by ordinances what was not commanded by law; forbids what was not forbidden by law, and then again punishes disobedience to the ordinances by heavy fines and imprisonment." (2)

responsible to any human authority. It was, however, considered advisable not to issue this pamphlet in print until after the Restoration.

(2) The transformation of the Privy Council is the outcome of a systematic combination of the right of issuing ordinances with administrative coercion. In fact a new legislation has been created which does not concur with but destructively opposes the legislation of the country and the parliamentary constitution. The state of affairs which existed in the Norman period returns, in which the royal power of inflicting police fines by amercements actually leads to a legislative power. The ordi-

nance which decrees the ship-money proceeds from the council. Financial sagacity revives even the old-fashioned fines for failure to take up the honour of knighthood, and the old forest laws themselves in order to open up new sources of revenue. In contravention of the statute of James I. monopolies were made a new source of income, as was also the incorporation of the wealthiest trades into guilds. The ordinances even invaded purely private rights, by pulling down houses and shutting up shops for the purpose of embellishing the surroundings of St. Paul's Cathedral.

8. *The selection of law officers by royal appointment* from among the leaders of the legal profession was intended to render the administration of the permanent part of the legal system independent of the temporary political system. This royal right had hitherto been exercised in such a dignified and impartial manner, that all the dynastic changes of the fifteenth century, and all the religious changes of the sixteenth century passed by without any change in the nature of the judicial body. Under James I., political motives, for the first time, dictate the dismissal of a Lord Chief Justice (Sir Edward Coke), and a shameless system of the sale of judicial offices appears, which shakes the honourable character the bench had gained under the Tudors. Under Charles I. this appointment to the judicial offices becomes a political system. As early as the year 1626, Chief Justice Crewe was dismissed for refusal to acknowledge the legality of enforced loans; in 1630 the Chief Baron, Walter, was suspended because he disputed the legality of a proceeding taken against members of Parliament on account of acts and speeches in the House; in 1634, Sir Robert Heath was similarly treated for his opposition to the ship-money and to Archbishop Laud. His place was taken by Chief Justice Finch, a man on whom the court could depend. The small number of judicial offices which were of consequence were filled with "men of confidence" in such a way, that the time soon came in which no constitutional principle and no law could be upheld when subjected to the interpretation of the judges holding office. In the counties, the appointment of the sheriffs and the formation of the commissions of justices of the peace was conducted on an analogous system. (8)

(3) The perversion of the position of the courts of justice begins as a dynastic feature contemporaneously with the accession of the Stuarts. James I. declared to his judges that he would himself decide legal questions, as he had been told that law depended upon reason, and he was as well furnished with reason as his judges. He often insisted upon a personal conference with the judges before they passed judgment—"auricular taking of opinions," as Lord Coke described it. Among his advisers there were even at that time supporters of the supreme sovereignty, who advised him to make an example of a judge for his audacity, by which the whole body would be kept in wholesome dread. One of these was the same Lord Bacon, who afterwards urged the deposition of Chief Justice Coke "as a kind of discipline,

because he had opposed the interests of the King, which example would keep the others more in dread." Ellesmere was directed to postpone an action against an accused individual, "because he has shown himself in the House of Parliament very zealous in our service" (Foss, vi. 2). Under James the principles were, however, always worse than their application, for which both courage and consistency were lacking. The shameless sale of judicial appointments, as those of the Attorney-General and the serjeants, for which sums of £10,000, £4000, and the like, were offered and accepted, was most pernicious (Foss, vi. 3). Under Charles I. the "strong rule" begins in this department. Not the laws of the land, but the personal will of the King was to be the rule of the courts. Thus came about the inconsiderate dismissal

With this apparatus of coercive measures, Charles I. now set himself to abolish the three fundamental rights of Parliament, which stood in his way.

The chief point was the *abolition of the financial rights of Parliament*. James I. had attempted to apply his theory of supreme sovereignty to the imposition of new taxes, but had afterwards given way. This attack was now again seriously renewed with that ship-money, which has become world-renowned. Former kings, relying on their military sovereignty, had, occasionally in time of war, raised contributions in money for the defence of the coasts of coast-counties. These were now made use of, in a time of peace, for the imposition of a money contribution upon all coast and inland counties, which was to be levied by the King in council, distributed among the counties and cities, and employed for the general purposes of State. It was required to raise a round sum of £200,000 in taxes, which amounted to quite as much as the subsidies that were ordinarily granted. The way was paved by the unanimous opinion of the twelve judges being previously obtained, and afterwards, when the case had, by Hampden's refusal, been brought to a judicial decision, a majority of the judges again declared for the legality of the tax, even *in judicando*. This was the centre of the attacks upon the constitution of Parliament and the turning-point of the constitutional conflict, because it proved to the meanest understanding the latest tendency of the Government, and the systematic corruption of the courts. Even that high royalist, Lord Clarendon, expresses himself upon this point as follows: "But when they saw in a court of law (that law that gave them a title to and possession of all that they had) reason of State urged as elements of law, judges as sharp-sighted as secretaries of State, and in the mysteries of State; judgment of law grounded upon matter of fact, of which there was neither inquiry nor proof; and no reason given for the payment of the thirty shillings in question, but what included the estates of the standers-by; they had no reason to hope that doctrine, or the promoters of it, would be contained within any bounds. And here the damage and mischief cannot be expressed that the Crown and State sustained by the deserved reproach and infamy that attended the judges; there being no possibility to preserve the dignity, reverence,

and suspension of the epposing judges, the appointment of "men of confidence" to the small number of important offices; for instance, Sir John Finch, on account of his approved behaviour as speaker of the Lower House, was appointed to the office of

Lord Chief Justice. On the occasion of the granting of the Petition of Right, the justices who were privately consulted were of opinion that the bill might be allowed to pass, and the Government continue the same practices as heretofore!

and estimation of the laws themselves, but by the integrity and innocency of the judges." After this judgment the moneys that were still needed were raised by supplementary ordinances. (a)

*The legislative power of Parliament* had its vulnerable point in the loosely defined province of the ordinances (p. 507), which form binding administrative rules, not indeed in contradiction to parliamentary statutes, yet co-ordinate with them. But so soon as Parliament was no longer convened, and an administrative executive was formed by the Star Chamber, every barrier was broken down. The police and financial measures of the Government were now carried still further by a progressive chain of ordinances, which fix the prices or provisions, regulate the incorporation of merchants and traders on payment of large sums of money, and open up other sources of revenue; they are supplemented in this matter by the police system of arrests and banishments. The unreasonably severe fines inflicted by the Star Chamber became also an immediate source of revenue. The system of

(a) The principal service which was demanded from the judges in the constitutional struggle was the recognition of the legality of ship-money. The twelve judges were first of all assembled under Sir John Finch, and (according to their own statements) were, under threats and promises, induced to deliver the opinion "that when the good and safety of the kingdom in general is concerned, and the whole kingdom in danger, his Majesty might, by writ under the great seal, command all his subjects, at their charge, to provide and furnish such number of ships, with men, munition, and victuals, and for such time as he should think fit, for the defence and safety of the kingdom; and that by law he might compel the doing thereof, in case of refusal and refractoriness; and that he was the sole judge both of the danger, and when and how the same was to be prevented and avoided." Only two judges dissented, but they were at last induced to sign the judgment. These judges were informed by Lord Wentworth "that it was the greatest service that the legal profession had rendered the Crown during this period." By a royal order, under the great seal, the sheriffs were instructed to burden every county with the duty of providing a ship. The county of Bucks, for example, in which Hampden resided, has to furnish a ship of war of 450 tons, with 180 men, cannons, powder, double rigging,

provisions, and all necessities. This ship is to be brought to Portsmouth by a certain day, and from that time on for twenty-six weeks to be kept in provisions, pay, and all necessities, at the expense of the county. But as no such equipment of a ship was really intended, the sheriff was further ordered, with the assistance of the mayors, to assess the requisite moneys upon the several freeholders and burgesses, and to hand in the assessment lists. In cases where payment is refused execution was ordered and carried out with the greatest rigour. The mass of the population submitted to the violent measures of the Star Chamber. Only John Hampden, by refusing to pay the tax, brings the question to an issue before the courts of common law, this time before the full bench of Exchequer Chamber. In giving their decision in this judicial case the judges felt some scruples; for fully three months they considered and argued the matter. Finally, seven judges gave their decision in favour of the Crown, while Croke and Hutton decided the principle in Hampden's favour, and the remaining three judges sided with the latter for formal reasons. The moral effect of this event was decisive as to the course of the civil war. The history of the ship-money is told in detail in Rushworth, ii. 335, 344, 352, 364, 453, 480-605, 727, 975, 985, 991, 1393, and App., 159-225, etc.; cf. Hallam, ii. c. 8.

ordinances directed against refusals to pay illegal taxes, against unfavourable verdicts of juries, and against unfavourably regarded members of Parliament, combined with the Star Chamber, silences for a time all opposition. (b)

*The right of controlling the executive*, and the right of impeaching ministers, was at length simply got rid of by not summoning a Parliament. To the other errors of Charles I. was added an entire failure to appreciate the elements of resistance. At court least of all was the decisive weight which the Commons now threw into the balance of political power understood. The history of England could till that time show no instance of any great movement which had emanated from the Lower House. Both corporately and individually the commons only appeared to the royal Government as elements of a second order, whose perversity could be silenced by simple means. As a blow for the intimidation of the opposition, at the close of the third Parliament, a judicial action was commenced against Sir John Elliot and two other members of Parliament on account of their speeches in Parliament, after the judges had been previously summoned together by a royal cabinet missive to give their opinion upon the questions of the Attorney-General relating to the case. In consequence of this opinion, information was laid in the King's Bench, which ended with a condemnation by the same court to a heavy fine and imprisonment. Elliot died in prison. (c)

The principal author and adviser of this new "vigorous" government was, next to Archbishop Laud, pre-eminently Wentworth, Earl of Strafford, who with the fiery zeal of the political renegade, and with his motto, "thorough," applied to England those principles that had been satisfactorily tried

(b) The illegal ordinances were enforced by the penal decrees of the Star Chamber, by arrests and police constraint. Besides fines and imprisonment the Star Chamber now decreed the pillory, corporal punishment, and cutting off the ears. Only sentences of death and confiscations were reserved to the ordinary courts of justice. The penal jurisdiction of the Star Chamber is, however, also an immediate source of revenue through pecuniary fines of £20,000, £10,000, and £5000, which are now ordinary phenomena. The total amount of them was computed by contemporaries at the incredible sum of £8,000,000 (Rushworth, ii. 219). Fifty thousand emigrants left their native land in consequence of this oppression. The King and Archbishop Laud only

found in this a matter for regret because ecclesiastical discipline could not pursue the emigrants. An ordinance prohibited further emigration.

(c) Next in importance to the judgments in Hampden's case it was the previously delivered judgment of the King's Bench upon Sir John Elliot, Denzil Holles, and Benjamin Valentine, on account of their speeches in the Lower House, which proved the corruption of the courts in ordinary and everyday legal questions, and with it the cessation of Government according to law (May, "Parl. Practice," i. c. 4). Contemporary writers all unite in remarking that from the moment these judgments were delivered public feeling in the country inclined to decided resistance.

in Ireland. By appointing the sheriffs and justices of the peace according to a party system, by corrupting and intimidating the municipal governments by the administrative penal jurisdiction of the Star Chamber, and in urgent cases by the employment of courts-martial, it was hoped to be able to overcome all opposition in the counties. This certainly involved an utter misconception of the substructure of the English constitution, of that union of the military, judicial, police, and financial administration with the county and municipal government. With the legal formation of the national militia, and with the office of magistrate and jury as necessary organs of the courts and the police, a system which presupposed an army of paid military and civil officers entirely dependent upon the Government was impracticable. The increasing opposition of the officers of local government, rendered independent by property, and the want of immediate executive officers, was sure in a very brief period to disarm both coercive administration and enforced taxation. Confronted with the barely organized elements of a standing army, the decayed national militia was yet too powerful to be met on equal terms. Sheriffs and magistrates might be deposed and appointed; but they had still to be taken from the district of the county itself, in which an illegal method of government was felt in quite another way than it would be in a professionally disciplined bureaucracy. It was owing to this cause, that the storm against the parliamentary constitution, which began in the centre, slowly abated in the counties, in which the reliable instruments of despotism were wanting. It was once more the communal system which saved English liberty from being overwhelmed by the despotic administrative system. A quiet but unconquerable opposition lay in the cohesion of the propertied classes, in the strong structure of the English county, and in its now firm union with the municipal and parochial bodies. The resources of the system became exhausted, the necessities of war and the Scotch insurrection forced the King after eleven years once more to call a Parliament; first of all the so-called "Short Parliament," which after a few weeks was frivolously dismissed, but only to make way shortly afterwards for the "Long Parliament" that met on the 8th of November, 1640.

The measures of the Parliament are directed successively against the specific abuses of the supreme powers, and accordingly assume a retrograde action against the three abused organs of the royal power:—

1. Against the *corruption of the tribunals*: by declaring ship-money illegal, and by cancelling the judgment against



Hampden; the judges who had taken part in these doings were put on their trial.†

2. Against the *Privy Council*: Strafford was impeached of high treason, and—characteristic enough of the morality of such a bureaucracy—the twelve judges give a verdict of high treason though the case was doubtful, against the leading minister, to whose bill of attainder and execution, the King also, as cowardly as he was selfish, gave his consent. But, for all future times, the administrative, penal and civil jurisdiction of the Privy Council, as well as all the accessory institutions of the Star Chamber, were swept away by Act of Parliament. The stat. 16 Charles I. c. 10 categorically declares, “that neither his Majesty, nor his Privy Council, have or ought to have any jurisdiction, power or authority, by English Bill, petition, articles, libel, or any other arbitrary way whatsoever, to examine or draw into question, determine or dispose of the lands, tenements, hereditaments, goods or chattels of any of the subjects of this kingdom; but that the same ought to be tried and determined in the ordinary courts of justice, and by the ordinary course of law.” To erect a rampart against the abolition of Parliament by systematic refusal to summon the Houses, the so-called *Triennial Act* declared the summoning of a Parliament to be obligatory after an interval of, at most, three years. The vexatious use, which Charles I. made of his prerogative of dissolving Parliament, is replied to by Parliament with the momentous resolution, which declared the present Parliament to be indissoluble without its own consent; even prorogation and adjournment might only take place by Act of Parliament.††

† The Long Parliament replies to the corruption of justice with an impeachment of high treason against the Lord Keeper Finch and the six judges who took part in the case, one of whom was even arrested upon the judicial bench in Westminster Hall. A like resolution passed in both Houses lays down for the future, that the judges shall be appointed for life, “*quamdiu se bene gesserint*.”

†† There exists no other sanction which public law can employ against an unconstitutional abuse of the right of decreeing, but the impeachment of ministers. The Lower House, accordingly, proceeded as boldly as it did consistently to an impeachment of Archbishop Laud and the Earl of Strafford for high treason. The accusation declared there had been an “attempt to subvert the fundamental laws of the land,” and this was consistent

with the truth. In the course of the trial a grave doubt arose, whether according to the letter and the application of the laws relating to high treason, such a proceeding fell under the idea of treason against the royal person or not, seeing that everything had been done in pursuance of the order, or at all events with the sanction of the King. In former criminal cases the actual will of the King had been distinguished from the legal will; the first of these had not been a protection to the ministers for the violation of the latter. But the application of the penalty of high treason to cases of this description was quite as novel as the conduct of Charles I. himself. The advice of the servile judges was accordingly obtained, and, without one dissentient voice, their reply ran “that upon the articles of accusation proved against him, Strafford had rightly in-

8. Against the *abuse of the ecclesiastical power* was directed the abolition of the Court of High Commission, which was similarly abolished for all time by stat. 16 Charles I. c. 11. This is immediately followed by the impeachment of the twelve bishops. It was further resolved on the first of September, 1642, by the Lower House, *nemine contradicente*: that the government of the Church by archbishops, bishops, their chancellors and commissioners, deans and chapters, archdeacons, and other ecclesiastical officers, was, by long experience, found to be a great hindrance to the complete reformation and the growth of religion, and a very great hindrance to the State and the Government of the realm, and that the House accordingly resolved to abolish it. Shortly afterwards an ordinance to this effect was issued, and the Church property was sequestered in favour of the Commonwealth. In due course there follows the condemnation and execution of Archbishop Laud.†††

Charles I. had given way to these strong but consistent measures. The Petition of Right (3 Charles I.), and the statutes 16 Charles I. have, in actual fact, the importance of a second Magna Charta. The constitutional struggle had now reached a stage which in the Middle Ages was usually concluded with a treaty of peace, with solemn compacts on oath under the guarantee of the Church. But it was soon manifest that a compact of this description to suit both sides could no longer be obtained. The dissensions between the King and the Parliament become more and more intense. The ill-considered attempt of the King to arrest in person five members of the opposition in the Lower House, and the dispute as to the command of the militia, give the signal at the commencement of the year 1642 for both parties to appeal to arms.\*

curred the penalties of high treason" (Parl. Hist., ii. 757). The condemnation was passed in the Lower House with fifty-nine, and in the Upper House with nineteen dissentient voices. Still more lasting was the energy with which both Houses in accord attacked the pernicious instrument of this mode of government. The abolition of the whole civil and criminal jurisdiction of the Star Chamber and of its imitations, the provincial councils, by stat. 16 Charles I. c. 10 was a decisive step for the whole future of England.

††† The Long Parliament replied to the resolutions of the convocations first of all with the stat. 16 Charles I. c. 11, by which the Court of High Commission was abolished with the proviso, that no

new court might be instituted with like powers, jurisdiction, or authority, and that all patents to this end were to be null and void. The Lower House declared the objectionable *canones* null and void, and not even binding upon the clergy, and impeached Archbishop Laud, and subsequently the twelve bishops. The feeling in this direction is evident from the unanimity of the resolution, which was passed with one dissentient, who proposed to send the bishops to a madhouse. By a resolution of the 21st of February, 1642, the twelve bishops were condemned to lose their temporal and spiritual estates, and to be imprisoned for life.

\* The "History of the Long Parliament," which has been handed

In the civil war which now began some accident gave special prominence to the two party-names, "cavaliers" and "roundheads." Nobles, knights, burgesses, and peasants divide into two camps, analogous to the English constitution; the elements of which had now come into collision with each other. On the side of the King are enlisted the majority of the nobles and the great gentry, partly from conviction and partly for the sake of honour; on the side of the Parliament the majority of the prosperous industrial towns and of the free peasantry, led on sometimes by lords, and sometimes by men of the old landed gentry, as Hampden, Digges, Vane, etc., who, according to the titular system of the Continent, would have borne high titles of nobility, or who like Blake, Bradshaw, and Cromwell, at least belonged to good families. The rank and file on each side consisted of the national militia similarly divided. The ruling classes had thus become cleft asunder, each party still inclined for compromise; the Cavaliers frequently negotiating even without the King's consent. On both sides the war was honourably waged, with conscientious observance of capitulations and truces, only with less discipline by the Royalists than by their opponents. No trace of class animosity is manifested; even among the conditions of peace of 1546 was included the elevation of Cromwell

down to us by the contemporary writer and parliamentary secretary, T. May ("History of the Long Parliament") has been republished (London, 1854); cf. Parry, "Parliaments," pp. 340-583. The eventful Long Parliament of the 3rd of November, 1649, consisted of 480 members of the Lower House for England, and 24 for Wales. To the Upper House had been summoned one duke, one marquis, 63 earls, five viscounts, 54 barons, two archbishops, and 24 bishops. The Lower House was one of the wealthiest and most brilliant assemblies that England had until then seen. Charles once more attempted the tactics of flattering compliance, but his words inspired no confidence. The reaction could therefore find no support. The ill-considered attempt of the King to arrest in person five members of the opposition in the Lower House, could leave no doubt as to the aims of the court. The condition of Scotland and Ireland were such as to lead to the inevitable necessity of voting supplies. The King scarcely attempted to disguise the fact that he wished to devote the money to levying a standing army. Parliament, on the other hand, de-

manded that it should appoint the lord lieutenant of the county militia; the King refused this, whereupon both parties took up arms. It now proved of great importance that James I. had repealed the older militia statutes as to the gradation of the military service (1 Jac. I. c. 25, sec. 216). The opinion again prevailed that the insular position of the country made an organized army altogether unnecessary. Since this time the Government had reserved to itself the right to recruit soldiers according as need arose. The civil war consequently began with greatly disorganized military institutions. Comparatively destitute of military pretensions as the militia was in the majority of the counties, it completely lost its cohesion so soon as the civil war broke asunder its composing elements. Whilst freeholders and boroughs for the most part took the side of the Parliament, the majority of the nobles and the old landed gentry with their tenants and servants declared for the King, so that at times it almost seemed as if the feudal array of the Middle Ages, and the more modern county militia were drawn up against one another.

and six others to the peerage or to a higher rank in the peerage.\*\*

The Parliament took the one course possible under the circumstances. As it had to impose taxes, pay armies, and administer justice, the creation of a kind of executive power had become necessary for the discharge of these functions; though the royal power was still recognized in principle. For self-preservation, the temporary retention of these institutions was proposed to the King in the nineteen articles as a condition of peace, yet not as a precedent of the constitution, but only to save themselves from being delivered over to the vengeance of Charles and his party. Even in the covenant with the Scotch insurgents, which went further, there is contained a solemn engagement upon oath "to uphold the person of the King and his authority."

The party which had been hitherto the leading one in Parliament was, for that very reason, incapable of bringing the conflict to a conclusion. True to their principles, they could not overthrow the monarchy, which they recognized as a precedent factor of the constitution, without undermining their own rights. Their principle of an equitable agreement—true and effectual within a recognized constitution—suffered shipwreck, on the impossibility of a compromise as to the broken constitution. And this impossibility lay in the person of the King himself.

Charles had been brought up at a time and with surroundings, in which deceit was regarded as diplomacy. A consti-

\*\* An external separation into two camps took place also in Parliament itself, when the King in December, 1642, summoned his "faithful" members to Oxford to continue the sittings. Only 118 commonsens obeyed the King's summons. The majority that remained away, consisted for the most part of the middle party, members of the Presbyterian way of thinking, and a small number of Independents. The greater number of the lords was likewise at first with the Parliament at Westminster, and it was only subsequently that the majority of the lords went over to the Parliament at Oxford (Rushworth, v. 559-*seq.*). But the great majority even of royalist lords and gentlemen still held firmly to the rights and privileges of Parliament, whilst the King treats his Oxford Parliament ("The Mongrel Parliament") almost with contempt. On a general average the parliamentary party, as compared with the royal party, was in a strength of about two-thirds to one-third of the

population. Nobles and gentry, town and country are to be found in the ranks of both, though in different proportions; only the State Church with its official organization that had now become absolute is wholly and entirely upon the royal side. To the latter belong just those northern provinces in which gentry and yeomanry had still retained their martial customs and inclinations. This circumstance and the unity in the command of the troops created an advantage for the royal party, which, however, became weakened by the fact that the mounted landowners and their tenants could not easily be kept in subordination, and it was even less easy to turn them into a regular army. The parliamentary party had the advantage in numbers, in its greater financial resources, in its better management, and above all in persevering zeal and the religious enthusiasm of the sects for the cause of liberty.

tution was altogether incompatible with his notions of the royal power, of royal duties and oaths. The tribunals, and all the oaths taken by officers of the realm had, after an experience of twenty years, proved unreliable. No one could doubt that the King, if he once regained possession of his despotic powers, would return with redoubled energy to his system. His well-known temperament, the feeling of injured honour, and the influence of a proud, intriguing consort, made his return to the constitution incredible. In all the contradictory acts of his public life, falseness and perfidy formed the predominating features. But the fundamental cause of this situation lay in the *system of the divine right* of kings, the faith in which prevailed at court, in the ecclesiastical as well as in the official world. In the atmosphere of this theological jurisprudence it was well established "that between a king and his subjects there can exist nothing of the nature of a mutual compact; that he, even if he wishes it, can permit no interference with absolute authority; that in every promise and oath of the King there is contained the reservation, *salvo jure regis*; that he, therefore, in case of necessity, may break his promise, and that he alone has to decide as to the existence of such necessity." By the immediate derivation of the illimitable royal power from a divine will, the right to it is declared to be incomprehensible to human reason without the grace of revelation. And it is consequently the Church, under its supreme bishop, which finally decides what in the State is sacred as a constitutional right, and what does not harmonize with the will of God. The Church has the key which fetters and looses not merely the individual conscience, but monarch and people in their constitutional relations to each other. This was the system which the clergy of the State Church pursued through the medium of the King, and the King through the instrumentality of the clergy. Within this system there existed no faith in royal words and oaths, and, as Charles, in contrast to his father, possessed both the courage and the unconquerable obstinacy to identify these theories with his own person, there was no basis upon which a compromise with this monarch could be effected.\*\*\*

\*\*\* The transactions of both parties, especially the nineteen articles, correspond indeed externally with the earlier events of the struggle between Parliament and monarchy, but they are closely interwoven with religious controversies. The covenant which was concluded with the Scotch is pre-eminent in this new region. What rendered

compromise impossible was the personal character of Charles which had been experienced for the past twenty years. From the first moment of his reign his words had been promises, and his deeds perfidy; and that not from precipitation, but systematically, and from calculation. A reliable proof of this is the testimony of Lord Clarendon as to how

The opposition, true to the constitution, found itself thus in the dilemma of either being obliged to sacrifice the constitution, and with it their persons and property, or of disowning their principles by attacking the monarchy itself. As they desired to do neither of these things, the leading men appeared paralyzed in their action, and each succeeding year less resolute to face the real state of affairs. It was manifest that the party of the Covenant, which had solemnly vowed "to uphold the person of the King and his authority," could not carry to an end the decisive struggle against the King. The fiction was accordingly resorted to, that "the King in Parliament waged war against the King in the Royalist camp." By means of this legal fiction it was possible to carry out a parliamentary programme, but not a war of life or death against actual Cavaliers.

It was only after an undecided civil war had been waged for years, that elements arose from the parliamentary party, whose ideal of Church and State went far beyond the existing order of things. The time of men with a religious faith in freedom had now arrived; and Oliver Cromwell was the first to form a regiment of such "men, well equipped in the quiet of their consciences, and externally in good iron armour, standing firm as one man." It was the sects who had, by the long administrative oppression, and by the Catholicizing tendency of the State Church, been driven to fanaticism. The ultimate results of the absolutist system, compelled from within, had led to an extreme application of the principle of self-determination in both Church and State, which, denying the Church as a common bond of outward life, dissolved it into separate groups according to the views of voluntarism, and thus dissolved the fundamental conditions of a parliamentary constitution in this direction into a system of Puritanical individualism. Half willingly and half reluctantly the middle parties abandon the field. With a regular army "of the new model" (cuirassiers, dragoons, and light

it was understood at court that everything which might be exacted from His Majesty under stress of circumstances, might be retracted by him on the first opportunity (Clarendon, ii. 252 *seq.*). "The next visit of His Majesty to his faithful Commons would have been more serious than that with which he last honoured them; more serious than that which their own General paid them some years after" (Macaulay, "Essay on Hallam," 1828). Until the close of Charles the First's reign the parties in Parliament found themselves obliged to obey the law of self-preser-

vation. With a bitterness, which the contemporaries certainly did not feel less acutely, Macaulay says: "Such princes may still be seen, the scandals of the southern thrones of Europe; princes false alike to the accomplices who have served them and to the opponents who have spared them; princes who, in the hour of danger, concede everything, swear everything, hold out their cheeks to every smiter, give up to punishment every instrument of their tyranny, and await with meek and smiling implacability the blessed day of perjury and revenge" (Macaulay, *idem*).

infantry) under able leaders, the contest now ends with the defeat, flight, and capture of the King. As in days of yore in the wars against France, the army of freeholders formed according to the newer military pattern was victorious over all the bravery of the nobles and their followers, which was only effectual in cavalry skirmishes.†

Hand in hand with the military victory the vindication of the Bible arguments with which the sects attack the divine right of the King is put forward in the Parliament, army, and petitions of all kinds—with a penetration, a dialectic strength, and a stubbornness equal to that of the court theology. In this biblical dialectic the ideal of the republic now appears, of which there was no symptom in the first years of the struggle. The Puritans had till then been religious parties. They demanded free regulation of their affairs in their Christian communities; their ideals were ideals of ecclesiastical constitution. They had desired to fight the King in his character of pope, and not as a temporal monarch. It was only in the breach of the constitution that the now existing inseparability between the ecclesiastical State and State Church became apparent, and with it almost involuntarily the republic as an aim and end. The heretical dogma, that "the sovereign right is based upon grace," and that accordingly the civil authorities lose their right by sinning, becomes secularized in the notion of a "high treason committed by the King against the people" (parliamentary resolution of 1st Jan., 1649). William Allen, adjutant-general of the army, testifies that, at the commencement of the year 1648, the council of officers, "after much consultation and prayer, had come to a very clear and joint resolution that it was their duty to call Charles Stuart, that man of blood, to account for the blood he had shed, and mischief he had done to his utmost against the Lord's cause and people in these poor nations" (Somers Tracts, vi. 499). Whilst the moderate members of the victorious party, doubting in their minds, considered the proceedings that were being taken against the captive King, and negotiated for peace, Charles, incorrigible in every situation, even in captivity, tried the arts of kingcraft to disunite the Parliament and the Scotch, the army and the

† In the course of the war the Parliament changed from the militia system to the organization of a paid standing army, in which Scotland had already preceded it. In the decisive battle of Naseby there fought on the Parliamentary side regular regiments, certainly composed only of recruits, who had been, for the most part, only for two months with the colours, and with

a corps of officers only nine of whom had served in the wars on the Continent, whilst the royal army counted more than a thousand of such officers. Yet in spite of this the struggle became one of annihilation in consequence of the discipline and enthusiasm of the Puritan troops. In discipline the "rebels" were from the first superior to the "malignants."

people. Simultaneously there came to light, with undeniable proofs, a new catalogue of his widely spread perfidies. Consequently, without any serious resistance, the moderate parties at last abandoned the King to the remonstrances of the army, and to the Puritan saints. But, in spite of all passion and violence, the loyalty with which individuals and parties cleave to their convictions of right, is characteristic of this contest of principles. As late as the 28th of April, 1648, the Commons pass the resolution "that they are not minded to alter the fundamental government of the kingdom by King, Lords, and Commons." In December, 1648, a majority of the Lower House vote that the King's person is inviolable. And even on the 2nd of January, 1649, the House of Lords (*i.e.* the remainder of the extreme left) unanimously reject the motion to put the King on his trial. ††

But in the meanwhile the remonstrance of the army had been heard in the House, in which "his excellency the Lord General and the general council of officers represent the dangers of the proposed compact with the King, and demand that the person of the King shall be prosecuted in the ordinary course of justice." When, however, the Commons, on the 5th of December, 1648, with 129 votes to 88, resolve that the conditions of peace be accepted, the army intervenes with force of arms against the majority, takes 47 members of the House prisoners, and declares 96 others secluded. After this violent expulsion of the dissenting members by the army, at the last division, in December, 1648, there were only 51 pre-

†† The theological side of the party struggle, which seems strange according to our views, harmonized with the events in which the royal supremacy had become the instrument of the overthrow of the parliamentary constitution. The theologians of this period had become statesmen, and the statesmen theologians. No other dialectical weapons except Bible arguments were brought into the sphere of politics in those days. The views as to the relation of the people to the royal papacy of the day stood upon this common ground, which was recognized by all combatants, and which afforded to all parties the arguments they sought. What brought the extreme parties to power was their resolute will to conclude no compromise, because they saw in the King's power altogether an usurped supreme episcopate, which was at variance with the divine will. This view did not perceive that the monarchy was at once the temporal foundation of all class rights, and the

indispensable precedent condition of the existing social order. For the sects whose consciences had been sorely offended there was no *via media* between a godless Caesarism and papistry and the overthrow of the monarchy itself. As the individual in a struggle for liberty forgets both wife and property, so does a people in such a struggle forget that it is a society in which after the victory has been won, struggles, whose end cannot be foretold, must begin afresh. The King, on the other hand, even in the face of such opponents, continues to practice his kingcraft whilst he is a prisoner to the army. "I am not without hope," he writes to Digby, "that I shall be enabled to bring either the Presbyterians or the Independents over to my side, that one party may wear the other out, and I be really once more King." But Charles's "juristisch-priesterliche" Nature (Ranke, ii. 568) had now met its match.



sent. In the room of the expelled members, the former minority of Independents, Levellers, and Republicans enter, both in the council and in the field. In spite of the protests that were raised, the remaining minority proceeds to sit as a House of Commons, and brings forward the indictment against the King, for high treason against the people of England.†††

The indictment, the nomination of a judicial commission, the condemnation and execution of the King, is the gravest act of violence in the whole of English constitutional history—an act which can only occur once in the history of a European nation. The fundamental violation of all the legal bases of the State, a violation which proceeded from the person of the King, finally recoiled upon his head. His *jure divino* monarchy, which sacrificed every right of his people to a presumed higher divine right of the King and to the interpretation of the court theologians, is overpowered by a religious conviction, which was surely more real than his own. We can apply to this act no criterion of right and wrong within any existing political system, but only the measure of moral right and wrong in the case of a society which had been brought back into the condition of self-preservation; in the words of Lord Chatham: "There was ambition, there was sedition, there was violence; but no man shall persuade me that it was not the cause of liberty on the one side, and of tyranny on the other."

The highest ideals of the human struggles in the Middle Ages,—the hereditary monarchy and the Christian Church,—had guided the English people in its history of a thousand years' duration, and had exalted it to a high degree of morality, justice, and culture. One of these institutions working upon the external side, that of justice, and the other upon the internal, that of the mind and conscience, had acted and reacted upon the other, and transformed and elevated society. Both were, and continued in the process of their realization by erring mortals, to be at all times exposed to abuse and degeneration, which even amount to a caricaturing of the most sacred things. The monarchy under John was

††† The army extorted the indictment which John Cooke, "in the name of the people of England," brought forward "against Charles Stuart as a tyrant and traitor, a murderer and a public implacable foe of the Commonwealth of England." The difficulty was to find a procedure and a president for such a judicial commission. The King conducted with dignity his defence before the illegal tribunal. His last words were: "Sir, it is for the

liberties of the people that I am come here; if I would have assented to an arbitrary sway, to have all things changed according to the power of the sword, I needed not to have come hither, and therefore I tell you, and I pray God it be not laid to your charge, that I am a martyr to the people." With firmness he met his condemnation and execution, which took place opposite the palace of Whitehall, amid marks of popular sympathy.

certainly more deeply debased than under Charles. The Roman Church was, at the time when Luther rose against it, more deeply degraded than the Anglican Church under Charles and Archbishop Laud. But in John's day, there still stood beside the debased monarchy a Church in the fulness of its moral power, represented by Archbishop Langton and his brothers in office. On the contrary, in the period of the Reformation the degenerate Roman Church was confronted by the heroic forms of the Church reformers and by able monarchs. In the Cæsarism and papistry of Charles I., both sides seemed to be equally degraded and perverted from their proper ends. It is for this reason that the opposition rises to that pitch, when the last resource of society returns which has been reserved from the birth of the hereditary monarchy. Once again society returned to the primitive state of self-protection, in order, by the overthrow of this monarchy, to prove the nullity of a monarchic papacy in a form such as this. Upon the foundation of the declared sovereignty of society (sovereignty of the people) a new political and ecclesiastical edifice had again to be built up, amidst severe struggles and perils both for State and society (Chap. XXXIX.), which were rightly foreseen by the moderate parties in the realm.

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## CHAPTER XXXIX.

*The Republic.*

THE now kingless State became a Republic, "the Commonwealth of England," as it was called, to avoid a foreign and unpopular expression. An act of Parliament of the 19th of May, 1649, declares the people of England to be "a Commonwealth and free State." The monarchy and the House of Lords are expressly abolished by resolution of Parliament as being "unnecessary and dangerous to the liberty of the people."

The enduring energy of the party which gained this success embodied itself on the one side in a victorious army and its brave lieutenant-general, Cromwell, and on the other in a Parliament, which, after the expulsion of the moderate members, only contained within it the former extreme left. By election of the House there proceeded a *Council of State*, in which Cromwell practically undertook the duties of president. The several measures of government were at first issued partly by the council of State, partly by Parliament, partly by the council of officers, and partly by the Lord-General in person. It was soon manifest that the opinions of the Parliament and of the army on this point, were widely divergent from one another. But the perils by which the country was beset, the necessity of unity in the operations against foreign countries and against the opposing parties of Royalists and Episcopalians, as well as the mediating influence of the Lord-General, held this irregular government together for several years. Cromwell recognized in the Long Parliament the sole legal bond of union between the past and the present. It was not until the 20th of April, 1653, that he made up his mind to dissolve by force of arms the assembly that had made itself odious alike by its measures and by the permanence of its session. The precise character of the Government remains from that time forward, in spite of certain transient forms, the *military dictatorship of Cromwell*, the incarnation of Puritanism.

And the impartial observer must confess with Macaulay that Cromwell represented the State with honour. Whilst the Stuarts had made England powerless in foreign parts,

Cromwell took his place among the most illustrious rulers of the times. The Netherlands, France, and Spain bowed their heads before England's might. The crowned heads of Europe, one after another, did homage to the Protector. Army and navy, Ireland and Scotland, obeyed as they had never done before. Trade and industry flourished, and the commercial policy of the Protector formed the established rule for England for generations; the taxation system was regulated, and a postal system instituted. The Protector was the first to estimate aright England's maritime vocation. Civil justice was honestly dispensed; Westminster Hall, Lord Clarendon himself confesses, had never been filled with more learned or more honest judges than by Cromwell, and never was justice more fairly dispensed in civil cases, in the courts of Law and Equity. Persons of capacity and integrity were chosen for the various departments of the executive, and genius and science were patronized. To this was added a new maxim of government, for which England has to thank the Puritans, the principle of religious toleration. A religious party, which was guided, not by the class interests of the clergy, but by the living realities of faith, could renounce the application of coercive measures in matters of faith. The time had arrived for toleration, now that Protestantism had irrevocably won its position in Europe. Abolition of the penal laws against Catholics could certainly not yet be won from the national mistrust; but they obtain a like measure of tolerance as the Protestant sects. Even the Jews, after a banishment of nearly three centuries, were allowed to settle again in England. This, and much more besides, was an efficient exercise of a sovereign's calling, to the shame of a degenerate royal dynasty.

In spite of all this, no content prevailed in the country, not even among the dominant party. Like every victorious party, it learnt that its position was changed by the actual possession of sovereign power. It certainly wielded the power, but it was also in conflict with the conditions of society. The structural composition of English society, as it had appeared since the Middle Ages, consisting of lords, gentry, freeholders, and tenants, of burgesses and artisans, clergy and legal corporations, with deeply rooted influences and traditional views, was in irreconcilable contradiction to the political ideals of the Puritan parties. These latter consisted pre-eminently of a respectable portion of the English middle classes, whose civil position afforded them but little experience for political government, and whose ecclesiastical position had, under long oppression, given them the habit of opposing but not of governing. Great and victorious as they

were, in the contest of arms, their political ideas were incapable of permanently fixing the form of the constitution. Rather did it become manifest that the demands made by the "people" separated into very divergent opinions and interests. The multitudinous petitions presented to the Long Parliament give us a picture of a public opinion that was as changeable as it was disunited.

*The Royalist and Episcopal factions* had hitherto formed a majority in the dominant class, which now, vanquished and under the pressure of a common misfortune, held closer together, and waived internal party-differences, including the Catholic and absolutist questions. The long ill-used, but now victorious party, demanded the punishment of those who had taken part in the illegal measures of Charles I., the now so-called "delinquents." The republic, with its hitherto unprecedented financial needs, decreed, to satisfy them, an enormous sequestration of estates, demanded considerable fines for compounding, and proceeded against those who had seriously compromised themselves, even to the sale of their property. It was calculated that in the years 1640-1659, between three and four thousand gentlemen compounded by paying sums amounting to £1,305,299 4s. 7d.; the sequestrated estates of those who would not compound, or who were not allowed to do so, were computed at five times that sum. Of the established clergy about two thousand were deprived of their benefices. Vanquished and weakened, but embittered and still possessing personal influence among their surroundings, these groups were irreconcilably opposed to the Government.

*The Presbyterian middle party*, the former majority in Parliament, which had been violently ousted out of Parliament by the victorious party, opposed the Government in as hostile a manner as did the old Royalists. They had not intended the overthrow of the monarchy. The oath of fealty taken to the republican government was more odious to them, than to the Cavaliers; their clergy refused to publish the ordinances of Parliament from their pulpits in the customary way. The indefatigable zeal for the carrying out of its scheme of a new ecclesiastical system shown by this party made it even more intolerant in Church questions, and at the same time more indifferent to questions of political liberty and civil rights than formerly. After it had nominally established its ideal system of ecclesiastical reform, the system itself proved impracticable, and isolated the middle party in a state of aimless discontent.

*In the more radical parties of the left*, which had gained the victory, thanks to Cromwell and his army, a gradual decom-

position set in, from the time of their actual influence and participation in political power. In one part, the Puritan ardour became secularized to an abstract republican political ideal, with tolerance or indifference in Church matters. In another part, the religious zeal against image-worship and against the episcopal hierarchy remained paramount. The secularization of Puritanism was naturally strongly represented in the standing army; political radicalism now formed a certain counterpoise to the religious element. But both, alike intolerant in their separate tendencies, were but poorly fitted for moulding the form of the real constitution and for conducting the real political government in England. The sole sovereignty of each of these parties would have become a despotism over the great majority of the people. And on that very account that organization retained the upper hand, which is perfectly indifferent to and independent of property, viz. the standing army.

A new feature for England in this situation was the ascendancy which the middle classes had obtained. Never yet, in the whole of English history, had a spontaneous movement proceeded from the Lower House alone, and still less from the lower middle classes. This time the monarchy was vanquished not by the followers of the barons, but by the brave convictions of simple people, under officers chosen from among themselves, and by an army, in which indeed a number of lords and gentry served, but only as leading men of similar political and religious convictions. This situation had given the middle classes a greatly elevated and self-respecting position, which an existing Government could just as little disregard as it could the temper of the army. Shortly after Charles the First's execution, and after the proclamation of the republic, petitions of the dominant constituents—the "well affected" as they now call themselves—crowded in great numbers from all sides, to make their representations heard in the State. They demand annual Parliaments, emancipation of the supreme power of the "people" from the influence of the King and the lords, abolition of the Privy Council and Court of High Commission, the self-denying ordinance, shortening of judicial proceedings, abolition of tithes, monopolies, excises and tolls, conversion of all taxes into a direct subsidy, the sale of the estates of the "delinquents," no coercion in religious matters, an annual stipend of £100 for servants of the gospel, and so on. The Little Parliament, subsequently summoned by Cromwell, proceeded to formulate the following demands: abolition of the Court of Chancery, institution of civil marriage, abolition of Church tithes and patronage—demands which, being at variance with the interests of the

dominant classes, brought upon this so-called *Barebone's Parliament* the contempt and hatred of a large portion of the community.

Was it possible, after all, out of these elements to form a parliamentary government according to the laws of the land and in accordance with traditional institutions? That government did not merely consist of one parliamentary body formed by elections in certain districts, and the other permanent body by the appointment of nobles; but it was based upon the deeply rooted interweaving of all magisterial rights with property, and upon the substructure of the *communitates*, who governed themselves according to the laws of the land. These social bases of the State had been consolidated for generations past. The higher personal duties in the State were so intertwined with the great landed interests, and the duty of serving on juries and the parochial offices had so grown up with the middle classes, that an English government could only be conducted with the traditional Parliament, constituted by county and municipal unions, partly elective and partly formed by hereditary rights and by office. After the civil war had broken up the old forms, the impossibility of arriving at an harmonious self-regulation in public life through any other combination became manifest. Parish, county, and Parliament confronted each other as *disjecta membra*, from the moment when the established Church and the bishops were abolished, the hereditary peerage set aside, the loyally minded gentry robbed of their political rights and of their possessions, the small enfranchised boroughs abolished, and the electoral qualification altered. The destruction of these foundations made the reconstruction of a constitutional self-government from below an impossibility.

The *militia system* of the county became impossible in the face of a standing army, whose merits, glory and efficiency appeared coupled (as is ever the case) with contempt of a militia which in the civil war had proved incapable. The militia of the republic remained accordingly quite a subordinate institution, to which all the less attention was paid, since together with an active militia the local influence of the gentry which was inimical to the republic would also again revive. (1)

(1) The military organization, from the year 1645, passed into the system of a standing army. The organization of this army is exemplary; in discipline and invincible bravery this English army was certainly never excelled by any in former or any in later times. In like manner the Protector was fully

alive to the vocation of England as a maritime power, and fostered it by adequate measures. But from 1647 the standing army would not tolerate any attempt to disband or reduce it, and broke out into open resistance of such a measure. The decayed militia institutions could certainly not regain

In the *judicial system* the continuance of judge and jury in civil cases was practicable; but, in criminal cases, the grand jury, formed of the gentry, and the petty jury, which was disunited by irreconcilable party contrasts, became serious elements of contradiction. A republican government could scarcely expect of such juries that they should enforce the new ordinances by their verdicts. (2)

The strength of the *police system* lay in the office of sheriff and magistrate. A republican government had herein only the alternative, either of appointing fit and proper persons on commissions of the peace in the customary manner, in which case it had to reckon with certainty upon a hostile majority; or it was obliged to appoint fresh unskilled and unfit persons, who lacked the necessary authority. The police administration was, therefore, from the first a weak point. It might work tolerably smoothly in the towns which were more inclined to the republic in their special civic constitution, but in the counties the Protector was unable to remove the old elements entirely, and still less was he able entirely to alter their ancient spirit. It was the military sense of discipline in the republican rule that accordingly led to the introduction of a harsh police system in the place of a self-government according to law. (3)

The *financial system* of the republic required unprecedented

their strength in the face of such a disciplined army, but were only employed for the purposes of police administration and for raising the taxes.

(2) The judicial system met with a difficulty in the existing staff of lawyers, which was so eminently royalist that Parliament in October, 1649, resolved to dismiss from their office and functions all judges, serjeants-at-law, barristers, attorneys, and clerks of the courts, who had shown themselves hostile to Parliament and had aided their opponents. The new appointments that were made to the judicial bench by the Protector were so respectable, that even the restoration partly retained these justices, or at all events restored them to their honourable position of serjeants. Of fifteen judges, who were in office at the restoration, not less than nine were found worthy by the new government to be confirmed or reelected in analogous positions (*Foss*, vii. 3); among them one of the most upright names belonging to the English judicial bench, Sir Matthew Hale. The principle that all the judicial officials proceed from appointment and not from election, was also retained by the republic.

lic; and likewise the formality which required that on each change of government the commission should be renewed, which was accordingly done eight distinct times during this period. The civil jurisdiction was so far better than it had been under the Stuarts. In like manner the introduction of the English language into the proceedings in an action was also a welcome reform (*Foss*, vi. 412). But all this praise ceases, whenever justice comes into collision with the sovereign powers of the Protector. Then judges are dismissed "for not observing his pleasure," judicial commissions are appointed, complaining attorneys arrested, and so on.

(3) The police power could not exist under the republican *regime* together with the fundamental institution of justices of the peace. In the counties, at all events, Cromwell could not possibly manage with a magisterial gentry of the old style. The republic reverted, therefore, to the system of provincial governments, which, however, owing to their paritanical seal came into conflict with popular customs.



resources for the maintenance of a great paid army, which was rendered necessary by the state of affairs in Ireland and Scotland. The old system of taxation, with its self-assessment in the separate communities, was thus insufficient; besides, the parochial constitution had been thoroughly disunited by the political and religious parties. Parliament resolved, according to former precedents, in the course of the year 1649, to make a monthly assessment of £90,000 on the counties and to levy an excise duty of five per cent. upon a long list of articles of consumption. The rating was on the whole justifiable, but fixed very high, and the imposition of taxes so irregular from a legal point of view that force had to be applied to the judicial and police institutions to maintain them. The new taxes weighed heavier upon the bulk of the population than the ship-money and the ordinances of Charles I., and their legality was quite as disputable as that of ship-money. There remained accordingly no alternative, but here also to put the new military and police power in the place of self-government. (4)

In the province of *Church government* the place of the overthrown established Church was taken by the equally intolerant ideas and constitutional schemes of the Presbyterians, in spite of the constant opposition of the old parties and the smaller sects. Every benefice was, henceforth, to have its parson and several lay-elders; several benefices taken together form a district synod, with a presbytery of clergy and elders; several synods form a province with a provincial assembly; at the head of the whole an ecclesiastical national assembly. But this system of piling up electoral assemblies proved as dangerous as it was impracticable for the teaching vocation of the Church and for its relation to the State. The spiritual electoral bodies at once showed the same bigoted intolerance as was manifested by the episcopal system, and were soon at variance with the Parliament, which was not inclined to recognize the "divine right of the presbytery," but on the contrary retained the appeal from spiritual courts to temporal tribunals. Such a variety of tendencies and insti-

(4) The financial system of the republic made quite unprecedented demands. Sinclair ("Revenue," i. 285) computes, but probably in an exaggerated way, the revenue returns of the State from November 3rd, 1640, to November 5th, 1659, at £83,331,198, of which £32,172,321 was land tax generally in monthly assessment; £7,600,000 tonnage and poundage; £8,000,000 excise; £3,528,632 from sequestrations; £10,085,663 from the sale of ecclesiastical estates; £4,564,986 from sequestration and composition with royalist gentlemen; £2,245,000 by the sale of the lands of delinquents. The requirements of the standing army appeared to swallow up all. At the opening of Parliament (13 Charles II.) Lord Chancellor Clarendon was able to say: "That monster Commonwealth cost this nation more in her few years, than the Monarchy in six hundred years."

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tutions were interwoven in the ecclesiastical world, that the principle of tolerance, which the Protector followed from conviction, was almost a natural result. The confusion in this sphere had become so complete, that external toleration naturally resulted as a necessity for a cautious Government. (5)

All these conditions and circumstances pointed to the concentration of the political power in one person, and in Oliver Cromwell the person destined by Providence was found. The stolidity of this man, coupled with an indefatigable activity, personal courage, and energy, the dry, blunt manner with which he makes straight for his object, are incarnations of the English character. To it belongs especially his honesty and the sincerity of his convictions, often misinterpreted by later writers on account of the biblical unction of his words, which was the language of the time and of the party to which he belonged.\* Only an entire misconception of the real state of affairs would ascribe the impossibility of the protectorate's arriving at an understanding with a Parliament, to ambition or thirst for power on the part of the Protector; for it was really due to the internal decomposition of all those cohesive elements by which the parliamentary constitution was organically welded together. It was, in fact, impossible to retain the old English counties in the old form of county courts, as electoral bodies of Parliament, and still more impracticable was this in the deeply disorganized Scotch and Irish counties,

(5) Most difficult of all was the state of ecclesiastical affairs. After the suppression of the Episcopal Church the Presbyterians succeeded in realizing their long-cherished ideal. About two thousand clergy of the State Church were obliged to yield to the new order, the majority of whom, however, are said to have been removed on account of evil life or ignorance, for whose support one-fifth of their emoluments was reserved. The vacant benefices were filled by men, who were recommended by the parishes, and confirmed by the ecclesiastical synods. The influence of this tendency was sufficiently strong in Parliament to bring about by ordinance the institution of presbyteries, but which only in London, Lancashire, and in one or two counties was actually carried into effect. The intolerant presumptuous spirit of the Presbyterian confession, had developed itself to such an extent that by this very means the way was smoothed for the restoration of the Episcopal Church.

\* English history of a later time, after the constitutional struggle had been ended, has been written in an

inimical spirit towards the conduct of the Protector. It has been exceedingly difficult for the English, down to the present century, to be just towards this man and his party. Modern "hero-worship" has attempted to set this right. Guizot's verdict is unjust, and coloured by personal as well as by national prejudices. Against it may here be placed the judgment of a doctor of divinity of our day: "The age was an age of faith—we may say, of a child-like and a loving faith. Such men as Elliot and Hampden, Cromwell and Vane, believed in God and Christ, in sin and the evil one, in heaven and hell, as the Bible presents them, and very much as Milton has depicted them. The world to them was full of spiritual influences, both good and bad—full eminently of God. Where duty called, men of this order could brave all things, and still feel that nothing was hazarded. To them there was no such thing as accident. All was in the highest hands" (Vaughan, iii. 132). Ranke's opinion is very objective (iii. 435-584).

which the Republic had incorporated into its constitution. From this condition of things no English Lower House, no English Upper House, no harmonious executive power for the legislation and taxation of the country could arise. The parliamentary constitution had grown out of a system, in which political rights (as being the exercise of the royal rights) had emanated from the unity of the royal power. After the overthrow of the monarchy, the dismembered limbs lacked the legal basis necessary for uniting the antagonistic social interests and the still more incompatible ideals of the political and ecclesiastical systems upon a common ground recognized by all the different parts. Each party threw upon the other the blame for this state of affairs. According to a plan that was correct *in thesi*, one part of the upper classes was desirous that Cromwell should assume the regal crown. Nobles and gentry both thought that with the monarchy their higher privileges would revive, and the clergy considered that it would be the means of restoring the Established Church. The lawyers thought also that the laws touching the impunity of those who serve a *de facto* King might prove useful in the event of a restoration. "A king of England," says Thurloe, "can only succeed to a limited prerogative, and must govern according to the known laws. A protector, although with less nominal authority, has all that the sword can give him." The republican strictness of the council of officers, however, induced Cromwell not to assume the royal title. He himself also probably felt that the regal dignity would alienate and isolate him from his own party, and that an historical monarchy could not be replaced within a living generation by a new dynasty from among the people. He preferred the title of Protector; retaining at the same time certain important attributes of sovereignty appertaining to the old constitution. His consent to the most important acts was necessary, and occasionally the clause even occurs, "and this shall not be changed without the consent of the three estates in Parliament." Cromwell was content to obtain the powers necessary for the present conduct of political business. He also satisfied the obligations into which he had entered by making from time to time an attempt to summon a Lower House according to the traditional forms, and to obtain the authorization to form an Upper House, though it was difficult to wring from the existing electoral bodies the consent to the appointment of an Upper House. His creation of lords, though performed with caution and conscientiousness, only aroused universal opposition. An Upper House, as the permanent depository of a permanent legal system, was really desired by no one, because nobody wished the state of affairs then existing to

remain permanent. On that very account it was impossible for the Protector to obtain an harmonious co-operation with any parliamentary body. Disgusted with parliamentary debates and majorities, which could arrive at no positive system of government and at no positive opposition, he dismissed his Parliaments with words of reproach. Apparently he had himself failed to discern the internal reasons why Parliament could neither by severity nor by indulgence be brought to co-operate with the executive Government.\*\*

But the Protector was not in the dark as to the needs of the State and as to the course the Government must necessarily pursue. The traditional offices were retained as far as was feasible, and filled with proper persons. The central Government was, in all essential particulars, conducted on the earlier lines of the King in council. In the administrative committees, the necessary consideration paid to the men of his own party was so far modified by the energetic control of the head of the Government, as a new executive is capable of doing. All that a royal Government, acting from the centre of the realm could perform, both internally and externally, was performed by Cromwell in quite a different manner from the Stuarts. But what this Government, from the nature of its creation, was as yet unequal to, was the exercise of sovereign rights through the constitutional organs of the *communitates*, and through the traditional self-government, to which it was hardly less opposed than Charles I. The taxes imposed by ordinance were refused, and, to quell this opposition, there were no criminal verdicts to be obtained from the jury. Accordingly a new "high court of justice" was constituted, analogous to the Star Chamber. Some persons were even condemned to death for violent resistance. For the same reason the provincial governments were again revived. The realm was divided into districts, under eleven major-generals, for the most part bitter foes of the Royalists, and harsh and overbearing towards the civil authorities. The military governor is responsible for the submission of his district, has authority to levy troops, to exact taxes, to disarm Cavaliers and Catholics, to examine into the conduct of the clergy and schoolmasters, and to arrest dangerous and suspicious persons. The State had to be governed; but the longer this Government continued in opposition to the social bases the more oppressive did it appear. The complaints against it are, at the close of the protectorate, constantly increasing.

Thus the state of affairs became, on the whole, more and

\*\* These attempts are so experimental in their nature and so transient that six or seven Parliaments of the

republic are mentioned; I have reviewed them all together at the close of this chapter.

more like the absolutism under Charles I., and from year to year the feelings of the upper classes turned as one man away from this rule. The old lords who had been removed from the Upper House were living partly in exile and partly in sullen retirement on their estates. The old gentry were in a similar position, partly persecuted, and robbed of their lands as "delinquents," with their old influence both in county and Parliament broken down. The established clergy had been in great measure dispossessed of their benefices, though partly submitting with reluctance to the Presbyterian constitution. The powerful law corporations were no longer summoned to the high offices of State, and were offended by reforms in the judicial system. Families, which had hitherto enjoyed distinction, were driven from their influential position, with all its pleasures and advantages. In their stead new men were almost universally at the head of the regiments and in possession of the offices; education, eloquence, and parliamentary ability were eclipsed by military merits and skill of a different kind; in principle only the "well-affected" everywhere preferred. It is thus readily conceivable how the achievements of the fanatical Puritan party were followed by an implacable hatred on the part of the wealthy classes. The forcible removal of all long-established institutions left behind, even in those who recognized in principle the justification of the revolution, a feeling of a wrong committed in carrying it out. It is for this reason that the period of the republic passed away without leaving any trace, either upon the inner life of the State or that of local government. Not a single institution, not a parochial office, not a single administrative rule of self-government dates from that time. Even the church rate had to be maintained by coercive ordinances. Such a system could only be kept up by the means by which it had arisen—by the standing army. Instead of the King and his courtiers the Protector rules with his officers, and self-preservation compels the party to remain in this position. It is the necessary consequence of every violent constitutional change that it is not the "people and the true right," but only a single party with its social and party interests that succeeds to the executive power.

And why had all this come about? England had wished to ward off absolutism; it had risen in arms against a violent and perfidious king, to defend the liberty of its Protestant faith, to defend the traditional law of the land in Parliament and in county, and to defend the liberty of the subject and of property. Instead of achieving this, the country found itself terrorized by a still more rigorous ruler, by a standing army, by a military-police system of rule, and by a disregard

of Parliament and of all the free institutions of the land. What no party desired to be permanent could only be an *interim*. The death of the Protector could not but lead to a return of the old party-majorities, and these latter to a restoration.

NOTE TO CHAPTER XXXIX.—The following is a list of the attempts made by the republic to form a constitution:—

1. *The first constitution* is the Sovereign Republic under the Long Parliament, with an elected Council of State. The Commons had already, on the 4th of January, 1649, declared that they, as the chosen representatives of the people, wield the supreme power of the nation, and that all laws enacted by them, even without the co-operation of the King or House of Peers, are binding on the people. The style of all decrees was to run "*auctoritate Parliamenti Angliæ*." The House of Peers was abolished as being "useless and dangerous;" in like manner the monarchy as being "unnecessary, burdensome, and dangerous for the freedom, safety, and public interest of the people." On the 15th of February a preliminary Council of State was appointed, which from time to time "receives the orders of the House." For the years 1650, 1651, 1652, 1653, a Governing Council of forty members was appointed, consisting tolerably regularly of the same persons. But this council is continually opposed by the Great Council of Officers, which even in the course of the year 1648, plays such a violent part. The army had formed for itself a kind of constitution: the staff officers constitute the upper council, each company or squadron chooses two adjutants or "agitators," who form a lower house. As the regiments are without chaplains, the officers and soldiers took upon themselves the duties of praying and preaching. The highest tribunal is a council of nine officers and civilians. The whole, with its reminiscences of the parliamentary system, and of the ecclesiastical organization, forms a compact body, which was only preserved by Cromwell's influence from the constant danger of a rupture with the Rump Parliament. On the 19th of May, 1649, England was by Act of the Parliament declared to be a "Commonwealth and a free State." Every member of the House was required to promise allegiance to the "Common-

wealth of England, as now constituted, without either a King or a House of Lords." On the 9th of January, 1650, by a resolution the number of future deputies for the counties and towns was resettled, and so distributed that for the future the House should consist of 400 members. In the meanwhile the small number of members of Parliament was to a certain extent supplemented by bye-elections. In February, 1650, their number had reached the total of 108; in November, 1652, it once amounted to 122 members. Although in formal possession of political influence, yet the House could never arrive at a resolution touching its own dissolution. The initiative though often taken was again and again postponed. Owing to its long duration, to the small number of members, and to the suppression of the House of Lords, the assembly lost more and more its representative character. It was, in fact, nothing more than a committee of confidential men of republican and strictly Puritan proclivities, which all along only represented the minority in the country, and was only able to assert its position by leaning on the army for support. In the army republican ideas were more violently and strongly represented than in the House; in the Council of State the reverse was the case. Of the forty members of the first appointed council, only nineteen could be prevailed upon to declare their consent to the proceedings against King Charles. Yet this House was the sole legal bond which knit the present to the past. Among the manifold collisions with this political body, Cromwell waited for the growing discontent which was certain to result from the harsh decrees, the imposition of taxes, the mistakes, and above all from its refusal to pass a resolution touching its own dissolution. On the 20th of April, 1653, the day had arrived on which with harsh words he declared the Parliament dissolved, and caused the chamber to be cleared and closed by soldiers. This is followed by

2. *The purely military dictatorship*, which Cromwell undertakes as captain-

general of the army. After a few weeks, however, by summons under letter and seal of the "Lord General," a number of men of confidence were convened, who were nominated by the council of officers (apparently also on the proposals of the clergy). The assembly met on the 4th of July, 1653, and gave itself the title of Parliament, but was called by contemporaries the Little Parliament, or Barebone's Parliament. The greatest number of members amounted apparently to 113. After making various proposals concerning changes in Church and State, and electing a Council of State, the assembly declared on the 12th of December "that the continuance of its sittings would not conduce to the weal of the Commonwealth," and placed its mandate of summons in the hands of the Lord General. The pious, honest assembly, in which the middle classes were strongly represented, had busied itself with motions for improvements, which particularly concerned its own sphere of life. It demanded the abolition of the Court of Chancery on account of the delays of that tribunal, and on account of the uncertainty of its decisions (the arrears are said to have amounted to twenty-three thousand actions), codification of the laws of the country, the appointment of new presidents for the courts (for which only two barristers were designated); the introduction of civil marriage before the justices of the peace, out of regard to the numerous Dissenters; at the same time the intention was expressed to abolish tithes and church patronage in the future. Further bills affected the regulation of the excise, the abolition of unnecessary offices and reduction of salaries. But these demands, reasonable enough in themselves, brought upon the assembly the scorn and the bitter enmity of the upper classes, especially of the clergy and lawyers. The Protector could carry out only a few of these proposals. In consideration of the resolutions passed by the Long Parliament with regard to the constitution, new writs of summons were issued for a Parliament to meet on the 3rd of September, 1654, and thus came about

3. A constitution with a *Lord Protector holding office for life*, and an *elective Parliament according to the one-chamber-system*. In the writs of summons to this Parliament the majority of the small boroughs were passed over, but on the other hand the

number of knights of the shire was considerably increased. At the opening there were about three hundred members assembled. (For information respecting this Parliament, see "A Diary of Thomas Burton, Esq.," by John Towell Rutt, London, 1828.) The Lord Protector in his opening address speaks of the necessity of a settled establishment, which could be expected neither from the Levellers, who wished to reduce everything to equality and to introduce a party government in civil matters; nor yet from the sectaries, who wished to overthrow all order and government in ecclesiastical things. But there was evinced in the first transactions a democratic spirit opposed to the protectorate. In consequence Cromwell declares as early as the 12th of September, 1654, "that he had received his office from God and the people, and that he did not intend to annul the privileges of Parliament; but necessity knew no law. He had therefore caused the doors of the Parliament house to be closed, and demanded of the members before their entrance a written recognition of his authority, without which they would not be allowed to enter." The Parliament yields; but its further proceedings still retain the character of a democratic assembly. According to resolutions passed by it, short Parliaments are to be assembled at fixed periods. The franchise in the counties is to be enjoyed by all freeholders of forty shillings yearly income, or possessors of £200 value in real or personal property; in the boroughs the old customs, charters, and privileges with regard to the elections are to remain in force. The number of members for England and Wales is to be four hundred; for Scotland thirty, and thirty for Ireland. The members are distributed with a view to the equalization of the several constituencies; the petition of the army of June 16th, 1647, had already demanded that the distribution of the deputies among the constituencies should be so arranged according to a certain *rule of equality*, particularly with regard to the amount of taxation, that the poor petty boroughs should be omitted, and the number of knights of the shire increased. Accordingly 270 deputies are for the future to be assigned to the counties, and 130 to the towns. To the House belongs exclusively the legislative power and the right to impose taxes. The Lord Pro-

tector grants all titles of honour, but no hereditary titles without the consent of Parliament. The formation of an Upper House or of any permanent body for the protection of the established legal system was never mooted. A Parliament elected in this manner has of its own initiative hardly ever considered any other legislative body to be necessary, save and except itself. The members of the council of 21 members are to be nominated, indeed, by the Lord Protector, but confirmed by Parliament. The question, as to whether before the definite acceptance of this constitution a conference shall take place, to come to an understanding with the Lord Protector, was rejected by 107 to 95 votes, whereupon, on the 22nd of January, 1655, Cromwell declares the Parliament dissolved.

4. A new constitution with a *permanent Lord Protector* and *two Houses of Parliament* is the outcome of the third Parliament, which Cromwell summoned on the 17th of September, 1656. The Protector demanded that only such members should be admitted "as had been approved of by the council, and received a certificate to that effect." In this way 93 members were excluded; yet after long protest they were at length admitted. According to a constitutional decree of October 1st, 1656, the Lord Protector shall give his consent to every statutory enactment; but in case the consent be not given within twenty days, the enactment shall become law without such consent. In the course of the debates it is manifest that the wealthier classes and the old parliamentary ideas are reviving. An "establishment of the Government upon the old and tried basis" is again mooted. The Protector is allowed to appoint his successor. Parliament is to consist of two Houses, the "other house" of 40 to 70 members, appointed by the Protector, confirmed by "this House." On the 25th of March, 1657, by 123 to 62 votes, the resolution was passed to the effect that "his Highness be pleased to assume the name, style, title and office of King of England, Scotland, and Ireland, and exercise the same according to the laws of these nations." The right of free dissolution of the present Parliament was expressly recognized as belonging to the Protector. The Protector, however, after some consideration, makes known on the 12th of May his definite refusal of the royal title.

On the 26th of May the constitution comes into force. On the 24th of June the Lower House resolves that "the other House of Parliament" shall "without further approbation" enter upon the functions which were laid down by the constitution. On the 10th of December, 1657, the Protector makes use of his right of appointment by summoning for life 68 members known as respectable men, but to whom public opinion would not concede the dignity of a House of Lords. As the hereditary peers hesitated to accept the new life dignity, the Protector was obliged to bestow the majority of his appointments upon persons who had risen to a certain position through the recent conditions of property and party. Both Houses assemble together on the 20th of January, 1658, received by the Protector with the address: "My lords, and you the knights, citizens, and burgesses of the Commons." On the first message "from the Lords," however, an opposition is raised to this title; the message is refused. The debate upon the point lasts for several days, until on the 4th of February, Cromwell dissolves the House with the declaration that he had not wished to undertake the Government without a number of persons between him and the House of Commons, for the prevention of tumultuous and popular tendencies. But only conflict has been the result, and no one was satisfied. He dissolved this Parliament, "and let God be judge between you and me." On the 3rd of September of the same year Cromwell died, worn out by the cares of such a Government; he was buried with royal honours. Then followed

5. The *Protectorate of Richard Cromwell*, with both Houses of a new Parliament, January, 1659. The elections to the new Lower House were conducted in the old fashion by summoning again the small boroughs, which had been hitherto excluded, and with a strict return to the old parliamentary notions. The Protector and the existing constitution were indeed recognized, but after lively debates and amidst expressions of general discontent, in which the question was mooted, "What authority abolished the old constitution?" The Long Parliament was described as being a "handful of the House of Commons," and as an oligarchy, "detested by all who love a free commonwealth." The other House was "for the present session" recog-



nized as a House of Parliament, yet with the proviso, that it was not the intention to exclude such old peers as had proved faithful to the Parliament from their privilege as members of that House. Fiery debates were especially caused by the question of the admission or non-admission of the thirty Irish members. On the 22nd of April, upon the demand of the army, Parliament is dissolved. Richard Cromwell's protectorate was no longer acknowledged. The officers demand that the members of the Long Parliament, which Cromwell had dissolved, be again summoned. Hence follows

6. The *reassembling of the Long Parliament (the Rump)*, in May, 1659. The old speaker, Lenthall, and about fifty members (who gradually increased to about a hundred) take their seats again, and declare "that they have been again restored by God's grace to the liberty and rights of their seats, wherein they were interrupted on the 20th of April, 1653." They elect a council of state, but arrive at no actual resolutions. In October violent dissensions break out with the army touching the competence of the civil powers. By

force of arms the discharged officers prevent the assembling of Parliament. Then follows an intermediate despotism by the army with a *committee of safety*. By settling their arrears of pay, and by the mediation of General Monk, external order was restored, but the Parliament was obliged to agree to receive again the members who had been violently expelled in December, 1648.

7. The sessions of the *Long Parliament in its changed form* continue for several months. On the 16th of March, 1660, however, a bill was read for the third time, dissolving "the Parliament assembled on the 3rd of November, 1640," and convening a new assembly of lords, knights, citizens, and burgesses for the 25th of April, 1660 (the so-called *Convention Parliament*), which resolved that Charles II. be restored to the royal dignity. With regard to the elections of the future Lower House, a resolution was adopted on the 4th of February, 1660, to the effect that "This House shall be filled up to the number of four hundred for England and Wales, and the distribution be as agreed in 1653."

## CHAPTER XL.

*The Restoration.*

As the individual, consciously or unconsciously, primarily judges the rights of his time and his surroundings according to his own interests, so, in a greater degree, does every class of society. Therefore it is that public opinion (the voice of society) is wont to judge of a party not by the rights or wrongs of its origin, but by its present doings, and therefore it is that the fate of parties of action in the life of nations is always the same. They are allowed to pursue their way, to grow, to act, and to wax great, only to be condemned and repudiated. This reaction is more violent in proportion as the victorious party more vehemently attacks the rights of the upper classes of society. For centuries the social rights of the lords, of the old gentry, of the established clergy, and of the legal profession had not been so much injured as under the republic, and that too, as it now seemed, without sufficient reason. The danger of absolutism had been removed by Charles the First's tragic end; the futility of such efforts as his appeared irrevocably established. The general ideas of the time from that day onwards are manifestly turned in the direction of change. The death of Charles I. had already estranged gentler minds from the victorious side. Moderation and justice now seemed to many contemporaries to stand upon the other side. Had not the King in 1640 conceded to everything that was fair? His execution had left behind it only the recollection of his royal bearing in his last hours, and of the many virtues of his private life. Everything that had happened might well appear as an evil dream to the generation that was growing up under the oppression of Puritan military despotism.\*

\* The long hesitation and vacillation before the advent of the Restoration (Ranke, vol. iv. pp. 1-122) is explained on the one hand by the continuous fear of the armed republicanism of the army, and partly by the apprehensions of an extreme eagerness to "restore."

It was well understood that to reinstate the family of an executed King, surrounded by a deeply offended circle of followers thirsting for vengeance, and to restore a suppressed party, whose losses could not be repaired without attacks upon property, was no

The true expression of these feelings and of the relations of power is the freely elected Parliament, which resolved the restoration of Charles II., about half of the members of which were Cavaliers, another half Presbyterians with a small fraction of fifty Republicans. On the entry of the youthful King the enthusiasm was so great that Charles in his pleasant manner remarked: "It must certainly have been my fault that I did not come earlier; for I have met no one to-day who has not said, that he always longed for my restoration." The phenomena of a restoration of the upper classes are psychologically always the same. Wherever the interests of society advance into the foreground, it can only happen in the manner of egoism, which is the essence of society. In the storm of addresses of this time, the English universities take the first place in a strange attitude, as representatives of theological jurisprudence. Oxford declared "that it would never depart from those religious principles, by which it was bound to obey the King without any reserve or limitations whatever." In a special act the theory of Filmer as to patriarchal monarchy and the rule of primogeniture (above, p. 548), as the God-appointed form of government was afterwards proclaimed. Charles II. was declared to be the "sweet savour in the nostrils of the Lord." Cambridge also condemned in strong terms "the violence and treason of those vehement men, who maliciously endeavoured to divert the stream of succession from its ancient bed." The zeal of the Restoration against Puritanism became in the sphere of social life, in art, science, and popular drama, and even in the sphere of domestic morals, a caricature. In good society the battle between "wit and Puritanism" became for a long time "a war between wit and morality." But the whole people now seemed to vie in condemning the revolution and its ideas, which, as they could not be sufficiently punished in the body, were accordingly hunted out in the grave, by attempts to dishonour the corpses of Cromwell, Ireton, and Bradshaw. The name "Republic" which had ever sounded strange to the people, was now connected with the memory of a long despotism, with sequestrations, confiscations, ruinous taxes, a military police system, and a sullen Puritanical rigidity of morals. It was only the Presbyterian middle party, which in religious conviction and in serious

easy task. The equally contradictory and obstinate pretensions of the Anglican, as well as of the Presbyterian Church parties, were sufficiently known; the unsettled disputes between Crown and Parliament were still in remembrance. These considerations delayed

the act of restoration, and for this transitional stage there was found in General Monk a cautious and safe man. It was only after the perfect safety of the profession of royalism was established, that the storm of loyalty burst forth.

apprehension of the future, strove to maintain moderation. (1)

In the first stages of the Restoration both parties proceeded side by side in comparative accord with forced moderation, which was necessary, if only from the continued presence of the Puritan army. Their joint work is the restoration of the parliamentary constitution, that is:

*Solemn recognition of the hereditary monarchy* and the sanction of its inviolability by the punishment of the "regicides," who had taken part in the sentence of death passed on the King.

*Restoration of the Upper House*, that is, of the hereditary lords, yet afterwards with suspension of the Catholic votes.

*Restoration of the Lower House*, that is, the representation of the counties and the customary towns, by which the decayed boroughs receive back their franchise, whilst it was taken from greater towns such as Manchester, Leeds, and Halifax.

*Restoration of the County Constitution*, by suppression of the military governments and by the reorganization of the militia as the army of the wealthy classes. (1<sup>a</sup>)

(1) The so-called Convention Parliament first met at Westminster on the 25th of April, 1660. On the 1st of June, when the King for the first time appeared in the Upper House, there were already assembled three dukes, two marquises, thirty-six earls, five viscounts, and thirty-three barons. In the Lower House the Presbyterian party was still so strong that on the 12th of May, 1660, Lenthall met with a sharp reproof because he had spoken disparagingly of the proceedings of the Lords and Commons in the last Parliament up to the year 1648, and had placed those who had drawn the sword in defence of their just liberties on a level with those who had struck off the King's head. The negotiations touching the amnesty came, after many adverse intermediate stages, to the final result, that those who had taken part in Charles the First's death were, to a certain extent, decimated. The ten regicides who were executed died, with one exception, with the firm and manly expression of the conviction of their right.

(1<sup>a</sup>) In the *militia legislation* (13 Car. II. c. 6; 13 and 14 Car. II. c. 3; 15 Car. II. c. 4) the militia appears purely as a counter-organization to the republican army and as an armed force of

the wealthy classes. The right of appointing the deputy-lieutenants and the officers of militia, exercised by the lord-lieutenant, results in the administrative and military corps being formed of the county gentry. The great landed gentry (£500 income from land) and the richest municipal landowners (£5000 other property) furnish the cavalry. The rich farmer (£50 income from land) and the well-to-do citizen furnish the infantry. The rest of the population is, as regards the duty of furnishing troops, *infra classem*. The constables may, however, compel petty landowners of less than £50 annual income from land, or £600 in personal property, to furnish in the same proportion weapons, pay, and other additional expenses. Papists and others, who refuse the oath, can be forced to pay £11 a year to furnish a horseman and his equipment, or thirty shillings for a foot soldier and his equipment. However, no one need serve in person, but each may furnish a substitute to the captain for his approval. For defraying the expenses of munition and other needs the administration may impose an annual rate, which must not exceed a quarter of the monthly land-tax of £70,000, as raised by 12 Charles II. c. 29. All this

*Restoration of the royal supremacy*, with which, in its later course the episcopal constitution, the acts of uniformity, the ecclesiastical jurisdiction and the liturgy of the Established Church again revive; and of course the right of the bishops to sit and vote in the Upper House.

To these are added certain statutes in the common interest. An amnesty, with the exception of the regicides; immunity of landed estates from feudal burdens; restoration of sequestered and sold estates, to the Crown, the Church, and private individuals. But, as a statute could not be agreed on as to this last point, the old possessors took forcible possession by driving out the new, in which transactions, however, a great part of the injured parties went without compensation. After the settlement of these difficult points, the Puritan army was disbanded in the most orderly manner, without any attempt at resistance. The upper classes were thus restored to their ancient position; and upon the former knights'-fees very valuable immunities were conferred. (1<sup>b</sup>)

But the next use which the restored classes make of their newly regained influence is, after the last barrier of moderation (the army) had been removed, to wage a systematic war with the moderate Presbyterian party, which had now done its work; as well as with the cities and boroughs, which had naturally roused the hatred of the knighthood. With calculating sagacity the half-Presbyterian Parliament of the 25th of April, 1660, was dissolved at the close of the year. The new elections bring in a Parliament that was almost entirely royalist. Although the Restoration had been brought about by the co-operation of the moderate middle party, the present majority does not scruple subsequently to denounce the Presbyterians, together with the Puritans, as anarchists, and by a series of Acts of Parliament, systematically to persecute all parties of "resistance" in both Church and State. Com-

was directed against the Puritan army, but under James II. was turned against the King's power.

(1<sup>b</sup>) The transaction of the abolition of the military fiefs was in England no contest as to the abolition of privileges, but of burdens. The feudal dues on change of possession, wardship, marriage, and the like, owing to the uncertainty of their periodical enforcement, had for a long time become unsuitable burdens. The republican Government had no longer raised them; their re-introduction could not, even in spite of the passion for "restoring," be dreamt of. And in the like manner it was certain that the Crown must be compensated for this chief source of its

royal revenue. But instead of imposing the compensation as a permanent rent or increased land tax upon the majority of landed estates, a malt-tax was resolved upon, which burdened persons of quite a different sort. This resolution, even supposing a state of distress had existed among the impoverished gentry, could hardly be justified, and was passed in the Lower House with only a majority of two. The whole of the landed estates in the country were, by 12 Charles II. c. 24, declared to be held from that time forth in *free and common socage*. But their liability to the land-tax and parochial taxes continued, of course, as heretofore.

pared with the behaviour of the republic towards the "delinquents," the Restoration meant to remain a step behind in the application of force; but, with the systematic consistency of party, the present majority insisted upon expulsion of its opponents from every office of authority in both Church and State, and upon a purification of the bureaucracy. As the majority of the civil local officials were corporation officers, this step could only be made effectual by introducing oaths of office, which excluded every honest opponent from holding office. The "Act for the Regulation of Corporations" makes a confession of the illegality of resistance a condition of being admitted to, and also of continuing in, any civic office. Those elected to serve in the future must, besides, have received the sacrament according to the rites of the Anglican Church within the year before their admission to office. In like manner, by a new Act of Uniformity, the acceptance of the Anglican Prayer-book was made a test for ecclesiastical offices, in order, in spite of solemn assurances, to drive away the Presbyterian clergy from their benefices. When the appointed day arrived, two thousand clergymen resigned their places. Every ordained clergyman must in future take an oath as to the theory of non-resistance, otherwise he is prohibited from teaching in schools, and is even forbidden to reside within a radius of five miles from an incorporated town. Supplementary police laws against the so-called conventicles, that is, against the religious service of Dissenters, and laws for the limitation of the right of petition and for securing a stricter censorship of the press, are the ordinary apparatus of a political reaction, which here proceeds spontaneously from both houses of Parliament. (2)

(2) The second Parliament, also called the *Long* or *Penitenter-Parliament*, meets on the 8th of May, 1661, and continues, with long adjournments and prorogations, until the 24th of January, 1679; that is, almost eighteen years. At the commencement of this Parliament the Restoration suddenly changed into an immoderate reaction against the former republican and middle parties. But, as is always the case, the war-cries of the watchmen of Zion ring out loudest in Church and State when there is no longer any danger to combat, but when selfishness begins to make profit of the victory that others have gained. The Restoration was justifiable from the point of view of the ruling class, in so far as what it strove for and recovered really belonged to it. The use, which

both gentry and Established Church in a passionate party spirit begin to make of their regained power was unjustifiable. Their hate appears to be implacable, and frames one persecuting measure after another. The Corporation Act (18 Car. II. c. 12), for the purification of the civil bureaucracy and for the permanent expulsion of all Dissenters from the municipal offices; the Act of Uniformity (18 and 14 Car. II. c. 4), more severe than that under Charles I., for the expulsion of opponents from the ecclesiastical offices and benefices; the press and censorship Acts (18 and 14 Car. II. c. 33; 16 Car. II. c. 7); the Act against conventicles (16 Car. II. c. 4; 22 Car. II. c. 1). But the deeply framed Test Act (25 Car. II. c. 2), which contains the rule that all offices of authority must

The exaggerated party watchwords of the Royalists, the violence of their measures against all opposition, against the press and the rights of societies, may easily cause the appearance of retrocession beyond the boundaries of parliamentary constitution. And thus has the Restoration been, in fact, frequently considered, though very erroneously. In spite of all the indignation against the Revolution, all the ostentation on the part of the universities, and all the patriarchal theories, the fact remained that the Restoration meant the reinstating of the monarchy by the wealthier classes, who on that very account, in both Upper and Lower House, assert a pretentious self-consciousness, such as had not been seen in England since the barons' Parliament. Notwithstanding all theories, no single advantage which had been gained in the Revolution was surrendered by these classes, and not one single real parliamentary right acknowledged in the struggle with Charles I., was again disputed. The watchword "Non-resistance," upon which so much stress was now laid, only expresses the royalist theory in the defensive, very different from the positive claim to "absolute sovereignty," which was advanced in former days. Just as little could the established ecclesiastical hierarchy undo the fact that it had been reinstated by the wealthy classes, and not *vice versa*. The independent hierarchical tendency of the Episcopal Church broke down from that time, and as from the first it found in Charles II. no sincere protector, it was obliged to lean upon Parliament. Both to its advantage and to its prejudice, the Church henceforward was again interwoven with the position of the ruling class. The Revolution, in spite of all the hatred which it had left in its train, had smoothed the way of parliamentary government. The firmness of character displayed by a Hampden, a Pym, and an Elliot, and the unscrupulous determination of the Puritan champions, had left behind them the universal feeling that the limits of the royal power could not in future be overstepped by any minister without danger to his life, or by any king without risking his throne. Charles II. and his ministers were thus far perfectly agreed as to the present position of the constitutional question. Within these landmarks of the constitution, the ultra-royalist party could be allowed to have its own way, which it did without making any attempt to tamper with the foundations of the constitution. In considering the theoretical principles of the party, the practical ground of their rights was never forgotten, least of all in the Upper House. A restoration of the monarchy was understood to mean a restoration of the long-be held by members of the Established Church, is meant as a counter-move to the court idea of a reconciliation with the papal chair.

established prerogatives limited by the estates of the realm, as they had existed before the encroachments of the Stuarts. Magna Charta, the Petition of Right, and the old-established constitutional laws, were partly by word and partly by deed acknowledged as continuing in force. (2<sup>a</sup>)

Charles the Second's Government is, in so far, a normal parliamentary Government in the more modern sense. All the legislation of this era is dependent upon an indisputable majority of legally elected Parliaments. No attempt was made at extraordinary legislation by the council; an insignificant ordinance against coffee houses was even recalled on account of doubts as to its being a constitutional measure. Just as indisputable was the right of taxation; no attempt was made to raise by indirect means tolls, benevolences, and forced loans. Parliamentary control of the administration and right of impeachment were exercised more effectually than ever. Formal encroachments on the part of the executive are much rarer than under the Tudors. The possibility of such proceedings was also in a great measure removed, for even the most extravagant supporters of the divine right of the Crown and of non-resistance did not desire, and would have scouted the idea of a Star Chamber and Court of Commission. The institution of a Court of High Commission was expressly forbidden, and on the restoration of the ecclesiastical jurisdiction, the express clause was inserted, that it was "not the intention to restore that court, nor to give validity to

(2<sup>a</sup>) The Parliamentary history of this period in its intricate details is clearly told by Hallam, *Const. History*, ii. c. 11, 12 (cf. Parry, "Parliaments," pp. 533-587); for an artistic description of its complication with England's foreign relations, cf. Ranke, vol. iv. p. 174, to vol. v. p. 92. The Long Parliament of 1661 is the hinge upon which the question turns, whether party-passion is the more dangerous in the form of a sovereign legislative or of a political Government not limited by law, and whether a system of party is more dangerous in its effects upon the *King in Parliament* or upon the *King in Council*. Party legislation has certainly been more effective in its workings; but a Government by law made the mistakes of the legislation so perceptible even to the dominant party, that it was inclined to make concessions. Still more strongly did the English self-government work in this direction. In the sphere of the community unjust and oppressive laws were felt in a much greater degree than in a disciplined

army of officials. Here lay a main root of the opinions that only slowly changed in the course of the Long Parliament. In the life of the counties, towns and parishes, the dominant class evolved from within itself a spirit of moderation, which an unprincipled monarchy did not understand how to spread about itself. The long duration of Parliament was originally intended to secure to the royalist party the full fruits of its influence. But in the consciousness of this security collisions very soon began between the Upper and the Lower Houses. In the years 1667-1670 party spirit reached its turning point. From that time forward the schisms gradually lead to a moderation, to which the bye-elections, which had become necessary after seventeen years, also conduce. At the close the retrospect of numerous impeachments of ministers and important laws for the protection of personal liberty presents a striking contrast to the feelings evinced at the beginning.



the Canons of 1640, nor to extend the authority of the Church."

And yet, as is generally acknowledged, since the days of the dishonourable John, England had not been worse governed than in this period of a normal parliamentary and ecclesiastical constitution. The true position of the kingdom, which certainly more than ever needed a royal mode of government, was that the upper classes, restored to the possession of their influence, only make use of this power for the systematic persecution of their opponents in both Church and State. This phenomenon was not new, but whilst formerly it had affected a few individual persons of high standing, it was now with legal consistency directed both against parties and classes. It had formerly its chief seat in the Upper House; but now pre-eminently in the Lower. But just in this point was seen how much the centre of gravity of constitutional rule now began to move towards the Lower House, and how much more dangerous the influence of parties could be upon the legislation and administration in a factious elective assembly.

There certainly was still a power which could put a check upon these party practices. The King, personally popular and influential, was again in a position to exert his royal right of protection in favour of the weaker party, and to regain the true rights of royal Government,—being all the more urgently called upon to do so, as he owed his throne quite as much to the persecuted middle party as to the persecuting party. What was required was the granting of the solemnly assured protection both in Church and State to a party, which as a majority in the Lower House in December, 1648, and which as the last remnant of the Upper House in the January of 1649, had manfully supported the rights of the Crown and the person of the King in spite of the violent action of the army. But for the second time at a crisis we discover the true spirit of the Stuarts. Ignoring his royal vocation, Charles II. once more discharged his God-appointed office with a degree of frivolity and falseness that has never been equalled in English history. With captivating manners, but at heart empty, unconscientious, and immoral, this Stuart used the throne primarily as a means of joviality and pleasure. During his rule, which lasted twenty-five years, the historian vainly looks for a trait of royal appreciation of the Church or the State, of institutions or of men. As he dishonoured the service of the Church by frivolous witticisms, so he degraded the peerage by his six bastards whom he raised to the ducal dignity; and thus the parties of the Upper and the Lower House were only important in

his eyes according as they affected his comfort. The extreme selfish proceedings of the royalists and their press he endeavoured at times to stave off from his person, as troublesome to him. Later, any criticism on the conduct of his court was obnoxious to him ("that a set of fellows should inquire into his conduct" (Burnet). But the thought of the more serious duties of the Crown never occurred to him. He let factions and ministers rise and fall or be impeached, while he trafficked with English interests to fill his coffers. The only faith that we can discover in his mode of action, is the faith in the hereditary nature of the Crown; the only dread, the thought of re-awakening the Puritan opposition. Whilst Charles I. politically undermined the belief in the Crown, Charles II. undermined it morally. The deficiencies in the constitution, owing to which such a mode of Government was rendered possible, will be seen from the following chapter. (3)

(3) The later short Parliaments of Charles II. are contemporary with the controversy to be discussed below (Chap. xlii.) as to the Protestant succession.

*The third Parliament* lasts from the 6th of March until the 12th of July, 1679, and is characterized by the violent feelings displayed in both Houses, and by the bill touching the exclusion of the Duke of York from the succession, which having been adopted in the Lower House by 207 against 128 votes, brings about firstly the adjourn-

ment and then the dissolution (Ranke, v. 93-111).

*The fourth Parliament* (from the 17th of October, 1680, until the 18th of January, 1681), was again characterised by vehement resolutions passed against the Papists, against the members of the Privy Council, and against the succession of the Duke of York.

*The fifth Parliament* (from the 21st to the 28th of March, 1681), was closed after the second reading of the exclusion bill in the Lower House (Ranke, v. 138-179).

## CHAPTER XLI.

*The King in Council and the King in Parliament.*

WITH the Restoration the old structure of the State is again set up. The King is again surrounded by his smaller and larger circle of councillors ; but in this period a change occurs in their mutual relations, to the prejudice of the Crown and to the advantage of Parliament.

I. *The Privy Council* is revived, as a natural result of the restoration of the Crown. It again consists of the great officers, lords and "others," whom the King summons to it. The great functionaries continue as enumerated in the rules of precedence issued by Henry VIII. At their head is still the *Lord Chancellor* who, since Lord Ellesmere (1608), is more frequently elevated to the hereditary peerage.

The *Lord Treasurer* passes into the new position of a directing minister of State and finance. Under Charles II., the Treasury, in the character of the supreme financial control, becomes permanently separated from the old Exchequer in its capacity as a general depository of revenue. The Treasury receives a new location in the Cock-pit, whence decrees, orders, reports and instructions proceed ; the personal appearance of the Treasurer in the Exchequer ceases from this time. Under the influence of the party-system the custom is also introduced of dissolving the office into a commission of several persons. (a)

Under Charles I. a special *Lord President of the Council* was appointed ; Charles II. had, in the interest of personal rule, left the office unoccupied, until in 1679 it became permanent.

To the great offices of State is now added also that of *Master of the Ordnance*, for the management of munitions of

(a) The Lord Treasurer in this century frequently appears as the leading minister. But at intervals the administration of the office is carried on by a commissioner, as in 1612, 1618, 1635, 1641, 1654, 1658, 1659, 1660, 1667, 1679, 1684, and 1687. A new addition

to the financial department is a *general excise office*, similar to that which was first formed in 1643 by the Long Parliament. By 12 Charles II. cc. 23, 24, the excise becomes an ordinary tax under a chief excise office in London.

war, the head of which since 1608 received the title of general; after the Restoration, the office was regarded as a ministerial office, and by warrant of 1683, constituted in the way in which it has remained until our own times. (b)

More and more important does the office of the two *Secretaries of State* appear, under Charles II. with separate administrative departments. From them there further becomes separated off in 1666 a *Secretary at War*, for the financial administration of the army, in a somewhat subordinate position. (c)

The stat. 16 Charles I. c. 10, touching the abolition of the Star Chamber, is significant as affecting the position of the council. As no constitutional experience failed to produce its effect upon Parliament, the Restoration did not seek to revive the Star Chamber, which, in the significant words of the stat. 16 Charles I. c. 10, had now lost all remnants of administrative justice. The law declares the Star Chamber and every tribunal of equal or similar jurisdiction to be illegal, denies all jurisdiction, power, or authority of the council in all the hitherto customary forms (below, Chap. xlviii.), and threatens every official with heavy penalties, who shall take part in an attempt to renew that jurisdiction. These powers were henceforward exercised by the King's Bench, so far as they could be derived from a superintendence of the courts of law and the magisterial jurisdiction; but for the most important extraordinary cases the only method of procedure was by private bill, *bill of pains and penalties*, restitution, etc., which shows that these extraordinary powers have passed from the King in council to the King in Parliament. An important motive for retaining a corporate form of council was thus actually removed. For mere deliberative functions, the institution of smaller committees could not appear inappropriate. Even under Charles I. the beginning had been made by a *Council of War* and a *Foreign Committee*. At the commencement of the Restoration it was intended to form a number of

(b) The Ordnance Office is connected with the attempts of the Stuarts to introduce a standing army. The warrant of 1683, places at the head a *Master-General of the Ordnance*, under him a lieutenant-general and four high officers, and in this manner the ordnance office continued down to 1854. The standing army (the so-called guards) who were retained after the Restoration, amounted at first to only about 5000 men; but in 1685 the number was increased to 8700, with an additional 7080 in Ireland. (As to the newly organized military system of the

Restoration, cf. below, Chapter xliii.).

(c) The office of *Secretary of State* also has now still a somewhat fluctuating form. Whilst Elizabeth had, during the last years, kept Sir William Cecil as a sole Secretary of State; in the years 1616, 1617, we meet with even three Secretaries of State; after this time two is the regular number. There still continue reminiscences of the former less important office of cabinet counsellor. Under the Restoration their position as full ministers of State is indisputable.

special administrative departments. A document, probably of a date shortly after 1660, is preserved in the Record Office, which gives a list of the proposed committees.

1. A committee of *foreign affairs*, including the correspondence with the magistrates and other county officials.

2. A committee for the *Admiralty, military, and fortification* business, etc., so far as they are adapted for the council.

3. A committee of petitions of *complaint and grievance*, excluding those of a purely private nature.

4. A committee for *commercial affairs*, particularly for the colonies, including Scotland and Ireland.

The Secretaries of State are to form part of all the committees. Besides these established committees, extraordinary affairs, needing special deliberation, were to be treated by specially appointed committees, "as was hitherto customary." Such committees were to present written reports to the King, to be laid before his Majesty at the next sitting of the council. Of these projected departments only one council board was practical at that time, which, under the name of a department for foreign affairs, really discharged the whole business of Government. But after the fall of Clarendon, all was merged in the diffuse cabinet Government of Charles II. The committee remained only a name for the confidential transaction of more important affairs in the King's cabinet, which soon afterwards received the name, and assumed the character of the "Cabal." Of the remaining committees only a Board of Trade attained a definite form. After Cromwell's commercial policy, it was not thought right to refuse trade and the colonies a certain degree of stable administration. By patent of the 7th of November, 1660, a council accordingly was created for the *general state and condition of trade*, and by patent of the 1st of December, 1660, a *council of foreign plantations*, partly with the functions of a minister of the colonies; in 1660 both were combined in a *council of trade and plantations*. In 1675, however, this department was again dissolved, and it was not until 1695 that a new Board of Trade was formed.

II. *The Upper House*, in which the bishops again take their places, on the 20th of November, 1661, assumes an altered character, owing to the large increase in the temporal peerage. Under James I. the number of the peers had been doubled, and at the close of the period it was trebled. The higher dignities conferred on peers, and the new creations are computed at 98 under James I., 130 under Charles I., 137 under Charles II., 11 under James II.; altogether 376 under the Stuarts, against 146 during the period of the Tudors. James I. created 62 new peers, Charles I. 59, Charles II. 64,

James II. 8 (May, "Const. Hist.," c. 5)—altogether 198, against which were to be set off 99 extinct peerages. James I. for some time even sold the dignities of baron, viscount, and earl for the respective sums of £10,000, £15,000, and £20,000. These lords are no longer like the nobility of the Middle Ages; they are the heads of the gentry, who conduct the internal administration of the country, whose permanent position in the office of justices of the peace and the county militia politically elevated and morally reinvigorated the peerage from below. As early as James I., recognition had been obtained for the principle that a peer must be summoned for each parliamentary session; the position of the Upper House as the supreme tribunal in the land is thus re-established and strengthened. In the civil wars, with insignificant fluctuations, the attitude of the lords on both sides was dignified and commanded respect. They successfully vindicated their position as depositaries of the law of the land, on the 2nd of January, 1649, when the peerage, in spite of the onslaught of the army after the King's condemnation, showed its courage by unanimously rejecting the resolutions of the Lower House. From the time of the Restoration onwards the peerage proved itself the permanent organ of the ruling class; at first, it is true, going with the ultra-royalist current, but soon again appearing at the head of the opposition. By the numerous new creations of this period, fresh energy and fresh influence flowed from decade to decade from the counties into the Upper House, which, in the time of corruption and party intrigues, was the first to restore a moral support to Parliament, and gained a paramount influence by the continual ministerial changes. The peerage has now become the moderating element for the protection of the constitution, in the face of vehement party clamouring for change. (2)

(2) The constitution of the Upper House changes its character owing to the very numerous creations of peers. The peerage, which under Elizabeth was held with a tight hand, appears under James I. to be visibly increasing. In 4 James I. writs of summons are directed to one marquis, 22 earls, three viscounts, and 46 barons. A generation later writs to the Long Parliament are issued to one duke, one marquis, 63 earls, five viscounts, 54 barons, two archbishops, and 24 bishops; the whole number has thus increased to 150; the temporal peerage has already almost doubled. To the Long Parliament of Charles II. in 1661, there were summoned five dukes, four marquises, 56 earls, eight viscounts, and 69 barons;

the number of the temporal peers alone is now 142. In 31 Car. II. the whole number (including fourteen minors and seven recusants) is 181, and in 1 James II., 178. The number of the bishops (26) remains unchanged. The foundation of the power of these new peers lies in the county self-government, and in their pre-eminent position in the local military and police administration, to which their position as hereditary counsellors of the Crown corresponds in the central administration. With the radical abolition of all the remains of feudalism by 12 Car. II. 24, their newer position appears still more unalloyed and decided. In 22 Car. II. the King, renewing an old custom, again began to take part personally in the proceed-

III. *The Lower House*, during the period of the Stuarts, experienced only trifling changes in its constitution by the admission of the county palatine of Durham, and by another increase in the representation of the boroughs. In the Parliaments of the Republic, the towns, from possessing four-fifths of the votes in England, had been reduced to one-third, but were now again represented in greater number than before. After the Restoration, country gentry, Church, and Crown all agreed to keep down the spirit of independence that was showing itself in the middle classes of the towns. The Corporation Act (13 and 14 Car. II. c. 2), sufficed for this purpose for a number of years. But during the Long Parliament of Charles II., opposition in this quarter was again discernible in the several by-elections. Thus situated, Charles II., in 1681, resolved, in the interest of court influence, still further to cripple the constitution of the boroughs. By the writ of *quo warranto* the new principle of a "forfeiture of the municipal constitutions" was applied in cases of abuse or informality. The charters were cancelled in great numbers, to be replaced by new ones of an oligarchical nature. James II., continuing this campaign, created everywhere small select committees, which, like the civic offices, were to be revocable at the pleasure of the Crown. In London alone, Jeffreys robbed 1900 enfranchised freemen of their suffrage, and was nevertheless blamed by the King for not making a more thorough clearance. In a few years 200 new charters of this description were issued. Including the mutilated municipalities, the number of members for England and Wales after the restoration was 512. (3)

ings, without, however, enhancing the dignity of the proceedings by his high presence.

(3) The constitution of the Lower House was increased under James I. by twenty-seven, under Charles I. by eighteen, and under James II. by six members. The excessive number of borough representatives had for centuries been a legislative problem. It had arisen at a time when the Commons, as yet in a subordinate position, assembled principally to vote the taxes. The Lower House was now a corporate unity, the members of which, after long political struggles, had for a long time considered themselves no longer merely as delegates of their constituencies, but of the whole country. With the Stuarts begins a general tendency to a transformation of the municipal communities by incorporation. Even James I. considered a social organiza-

tion and creation of close boroughs a very "politic" measure, and in the twelfth year of his reign, when Dungannon, in Ireland, was made a borough, it was declared by his judges that the King could by his charter so incorporate the city in the form of select classes and a commonalty, that the whole body had the right to send members to Parliament, whilst the exercise of the right was at the same time confined to the select classes. After this fashion, under James I. and Charles I., seventeen old boroughs were reinstated in their lost parliamentary franchise; and four new parliamentary boroughs were created. The Parliament itself, which since James I. had gained the exclusive right of deciding its own elections, now also acknowledges in a resolution of committee of the year 1623 the principle that a limitation to a narrower circle of electors could validly take

Apart from this, the constitutional struggle greatly elevated the self-reliance of the Commons. The local government system became consolidated in the parishes, and allowed the middle classes, who took part in it, to exercise a stronger influence upon the parliamentary elections. Besides this, the enormous suppression of the poorer electors in the municipal constituencies by the new corporation charters assimilated the relations in town and country to each other in favour of a uniform influence of the gentry in both borough and county. The great extension of the magisterial office especially strengthened the legitimate influence of the gentry, began to level the difference between the greater and lesser nobility, and to give to the whole of the more highly educated and wealthier classes the common feeling of a dominant class. In the intellectual life of the people the internal effect of the Reformation was now everywhere manifest. It is accordingly easy to understand, how, after the Restoration, the House of Commons was enabled to proceed with an amount of self-reliance till then unknown. During its eighteen years' duration, the Parliament, much against Charles the Second's intentions, had educated a body, the most illustrious members of which felt themselves the equals in political experience and social position of many of the peers recently created from among themselves. Thus may be explained the numerous disputes between the two Houses concerning competence and etiquette.

With respect to the finances, the influence of the Lower House appears materially enhanced. In 1626, the Commons succeeded in establishing their precedence in the question of money bills, with regard to which they figure as the solely voting part of the legislature. This claim was further

place by "prescription and custom, whereof the memory of man runneth not to the contrary." In another direction, in a celebrated committee of the year 1640, under the presidency of Serjeant Glanville, the old maxim that every one paying scot and bearing lot was entitled to the franchise, was again recognized to be the regular rule, and applicable in every doubtful case. After the experiences of the revolutionary period the question had now become a highly important one which on all sides now began to be estimated aright. The municipal elections opened to the landed gentry in their magisterial and social position an almost greater personal influence than the county elections, yet not to every gentleman, but only to such as to a certain extent

respected the interests of the towns and their feelings, and endeavoured to win them over. They remain accordingly the chief hearth of political and dissenting opposition, from which the provincial opposition drew its chief strength. Instead of a reform the Crown, however, only gives them the mutilation of the right of suffrage by charters framed upon oligarchical lines. Moreover, it was reserved to the Crown to make changes from time to time in the new charters, at its pleasure, through Government commissioners. Instead of restoring a self-relying and independent citizenship on lines analogous to those of the county system, the Stuarts practiced their kingcraft even upon the towns.



strengthened by the abolition of the hereditary feudal revenue of the King. The concentration of the whole of the direct State taxes by a uniform assessment, combined with the new requirements of the State and the army, but most especially the bad financial economy under Charles II., conduce to a constant extension of the right of voting the money bills. After 1664 tenths and fifteenths are no more mentioned, but the old republican mode of assessing land and income tax *in concreto* is again resorted to; Cromwell's rectification of the tax-rating and assessment lists was accordingly retained. Into this thorough taxation-assessment, ecclesiastical property was likewise drawn. Since the special money grants of the clergy had long since lost their peculiar character, it was only a somewhat delayed consequence, that the outward form also of the grant in Convocation was in 1664 abolished by means of a simple agreement between the Lord Chancellor and the archbishop, in return for which, as a matter of course, the right of suffrage in parliamentary elections was conceded to the clergy by virtue of their freehold tenure. By 16 and 17 Car. II. c. 1 the parliamentary subsidies were for the first time raised according to this new system. The long labour of reuniting the clergy with the laity had involuntarily attained this result. Still more durable was the influence of the Lower House owing to the introduction of the so-called appropriation clauses into the money bills. Amid all the intrigues of the court and of parties, a change was effected by 17 Car. II. c. 1, according to which a clause of expenditure is annexed to the money grant, by which the Lower House assumes the control of the expenditure-budget of the State, and thus gains a less apparent but a permanent influence upon the course of political administration. (3<sup>a</sup>)

(3<sup>a</sup>) Oddly enough this change in the budget was brought about by the aid of an intrigue at court. Sir George Downing, one of the tellers in the Exchequer, suggested to Charles II. that a proviso should be added to the impending bill of supply, "that all moneys to be raised by the bill should be exclusively applied to the purposes for which they were voted." By this means the disposal of supplies would be taken from the Lord High Treasurer, and the King would be enabled personally to conduct the business of the Exchequer, so that the Exchequer would at once afford the best opportunity for investing moneys, and in consequence would become the greatest bank in Europe. This was connected with the custom of raising, for the current needs

of the Government, loans from bankers (at that time the Goldsmiths' company, in London), upon the personal credit of the King and the Lord Treasurer. The King probably wished by this clause to evade the obligation of employing the moneys voted for the repayment of such advances. The ministers strove to get the dangerous innovation annulled ("Life of Clarendon," continuation, p. 315, *seq.*); but the bill had already passed the Lower House, and though it was delayed by the Lords, it could not be thrown out, without risking the whole vote (£1,250,000). The King accordingly declared that the clause had been proposed with his sanction, and the Act (17 Car. II. c. 5) really passed with the proviso, that a separate account

It is characteristic, that both Houses, when at the height of their loyalty, are bent with a hitherto unheard of zeal upon establishing and enlarging their personal privileges. In 15 Charles II. the House recurred to the unconstitutional criminal proceedings taken against Sir John Elliot and his associates. With the complete concurrence of the Upper House, the judgment delivered at that time by the King's Bench was declared null and void, and the unconditional irresponsibility of the members for their speeches and procedure in the House was recognized by express resolution (Hatsell, "*Preced.*," i. pp. 86, 208 *seq.*, 251 *seq.*). Liberty of speech has since that time never again been called in question.

The relation of the Crown towards the greatly increased pretensions of Parliament was in no wise so favourable as the ultra-royalist theories led men to expect. However, in spite of the abolition of the Star Chamber and the Court of High Commission, there was still many a loophole for the effectual exercise of the King's influence in his spiritual supremacy and temporal prerogatives; by the appointment of the council and the judges of the realm, and by other rights of appointment in both Church and State, by grants of favours, by personal influence with the members of both Houses, and with important local officials. The future of the monarchy depended upon the use which it made at this time of its personal rights. But Charles II., fatally misjudging the future, exercised these rights in a manner which has covered his name with everlasting obloquy. The narrower the sphere of a possible use of the royal prerogatives had become, the more unconscientiously was it exercised by Charles II. and James II.

1. *The right of appointment vested in the council* leads in the hands of Charles II. to the transformation of an honourable council of ministers into an unprincipled cabinet. James I. had, after the death of Elizabeth's old ministers, abandoned the custom of the continuous transaction of State business in the council in order to enforce his private ideas with respect

should be kept of the moneys raised in accordance with this act, distinct from the King's other revenue, "and that no moneys leviable under the act should be issued out of the Exchequer during the war, but by order or warrant, mentioning that they were payable for the service of the war." In the ensuing year the Commons again voted the supplies with the same disagreeable proviso, to which the King agreed with a bad grace, and promised to appoint a commission under the great seal, which was indeed, *pro forma* appointed. But in the ensuing year was passed the stat.

19 Car. II. c. 9, "an Act for taking the accounts of the several sums therein mentioned," by which the Lower House effectually secured a power that had been occasionally exercised in the fifteenth century, of examining into the special application of the public revenue, and thus exercising the right of jointly controlling the expenditure budget. The clause of appropriation became from that time forth more and more a standing formula, and in the eighteenth century with some exceptions was permanently inserted.

to Church and State in confidential cabinet deliberation. Charles I., himself irritable and inexperienced, carried on with heedless advisers this mode of government, which at every critical moment gave the Queen and the courtiers a deciding voice. But under Charles II. the second era of a cabinet government begins, which is remarkable as the personal creation of the King. Even after the judicial powers of the council had been cut away root and branch, there was left to this cabinet the decision as to important measures of domestic policy, and the whole province of foreign affairs, which latter, from their very nature, could not be dealt with according to legal principles and parliamentary laws. The use made of these under the Cabal ministry, as well as under Shaftesbury's and Danby's administration, is known to history. In the European complications of that time, France pursued no other aim but that of hindering the consolidation of the constitutions in the neighbouring states, weakening their participation in European diplomacy, fostering their internal dissensions, and directing the personal interests of the several monarchs to dynastic alliances and treaties of peace. The great Louis actually succeeded in doing this in England. The position of foreign affairs had, in the second half of the seventeenth century assumed a more complex form than in the first half. The question of Protestantism stood no longer alone in the foreground, but was intermixed with questions of the European balance of power. The natural alliance of England and Holland was at times opposed by a petty spirit of trade jealousy. Here was a fruitful soil for diplomatic complications, for which Clarendon's dismissal was the signal. When in 1668 the King found his coffers empty and the temper of his Parliament doubtful, he devised the plan of entering into secret negotiations with the King of France, which might lead to the furnishing of money supplies. In the course of the confidential correspondence, the question of religion became mixed up with the money question. In January, 1669, the King summoned Clifford, Arlington, and Arundel to a confidential conference at the Duke of York's, and declared how painful it was for him not to be able to confess his true faith. With tears in his eyes he entreated them to advise him as to the best manner of enforcing the Catholic religion in the realm. This negotiation leads, after the lapse of a year, to the secret treaty with France (1670), in which it is left to Charles to choose the time that shall appear most suitable to him for publicly declaring himself a Catholic. On the other hand France promises an annual sum of £200,000 for defraying the war expenses, for the promised assistance against the Dutch, and for keeping down the

dissatisfaction that was to be expected in England. Both parties give up all claim to independent peace negotiations (Ranke, iv. 358 *seq.*) When the French subsidies are exhausted, Charles again demands, in the year 1674, a fresh subsidy of £400,000, with the intimation that otherwise Parliament would have to be convened, which would at once declare for war in alliance with Holland against France. Louis, however, on this occasion, pleads want of money, and grants only about one-fourth of the sum demanded, on the King's promising to prorogue Parliament from November, 1674, to April, 1675. In the later negotiations (1678) Charles II. adheres to the policy of selling his neutrality at the highest price which could possibly be obtained from France. Whilst the increasing greatness of France fills Europe with alarm, and Parliament, ready for war, in 29 Car. II. declares for an alliance with the States General, the King ungraciously replies to the address, "that it was a matter ill calculated for the interference of the House, which was encroaching upon his prerogative of making war and peace." In this state of affairs, Louis accords a further payment of 2,000,000 livres for the year 1681, and an annual allowance of 500,000 crowns for the two following years. Whilst the King declares to Parliament his readiness to begin a war with France, and demands subsidies for this purpose, he is at the same time engaged in selling his services to the French King at the highest possible price. The legal responsibility of the ministers for violations of law certainly did not suffice for treason on the part of the King himself. It can easily be understood how Parliament came to extend impeachments of ministers to their political conduct, to the "honesty, justice, and ability" of the ministerial administration, a principle which was first laid down in the impeachment of Danby, and led to the idea of a so-called political responsibility of the ministers to Parliament. (1)

(1) The cabinet and the foreign policy of Charles II. was the development of a system of earlier invention. James I. had more and more abandoned the solemn sittings of the council, regular deliberations with the assistance of the judges, and the formal recording of the proceedings. Charles I. had during the civil war at last given up all formality. The loophole which was here afforded Charles II. left the whole of foreign policy open to an irregular treatment. Alliances, treaties, and political combinations in foreign affairs were the proper field for the frivolity of his character. In Charles

II. there was added to the perverse family traditions the influence of French education and manners. A thorough description of these foreign affairs (Ranke, iv. 196-496; v. 1-92) presents extraordinary difficulties on account of the complication of the European and cabinet intrigues with the party-system of Parliament. As to the first attempts at a reunion with Rome *cf.* Ranke iv. 232-256; as to the origin of the Test Act, iv. 411-425; as to the secret Treaty with France of 1670, iv. 358-376. It was only in the later complications that Louis XIV. came into immediate connection with the opposition

2. *The right of appointing the judges* had been already made use of by Charles I. for filling the bench with men of confidence and adherents of absolute sovereignty, and, by the influence of the cabinet and the court for making the judges instruments of an unconstitutional Government. The second period of the Stuarts in this matter likewise went to greater lengths than the first. After 1665, the revocable appointments of judges were resumed, and, after Clarendon's dismissal, the King thought he need put no further constraint upon himself. During his reign three lord chancellors, three chief justices, and six judges were dismissed, notoriously for political reasons, and, on the other hand, the most important places were filled by pliant minions of power. The maxim of Government, which Bacon had applied to Henry VII., had returned, viz. "he governed his subjects by the laws, but the laws by the lawyers." The more cunning devices of Charles the Second tried to prevent these manipulations of justice from becoming too notorious. In the action against Sir S. Barnardiston, however, a procedure was employed which was patent to every one, by which the King, immediately before the decision in the appeal court, appointed as members of the court sundry counsel who had conducted the prosecution. When the proceedings touching the pretended papist plot began, Chief Justice Rainsford was dismissed to make room for Scroggs, who proved himself entirely worthy of the confidence reposed in him, by continuing the false charges first in one direction and then in another, and by freeing the Duke of York from a serious charge, by the sudden dismissal of a grand jury. As he had, however, completely lost his credit by this notorious scandal, it was found to be expedient to give him a successor, who had, on the same occasion, proved himself quite as unconscientious. Pemberton was made chief justice, chiefly, that he might preside at the trial of Lord Russell, whom he certainly brought to the scaffold without, however, satisfying all the expectations of the court. He was accordingly soon replaced by a successor, on whom the King could even more implicitly rely. The judicial decision most important for the King at this time was the annulling of the municipal constitution of London and of the borough charters. For this purpose, after the dissolution of the last Parliament (28th March, 1681), the proceedings began by a writ of *quo warranto*, under the conduct of Saunders, the most adroit special pleader of his day. After the case had been drawn

in Parliament (Ranke, v. 55-73), as to which Charles was quite as much deceived as the Parliament was by him. The total amount of the French pay-

ments to members of Parliament is said, however, not to have exceeded the sum of £16,000.

up with every artifice, Saunders was appointed Chief Justice of the King's Bench (Amos, 141, 268). As an extra precaution, Charles personally exhorted the judges that they should deliver judgment in his favour, whereupon the city was condemned to lose its municipal privileges and to pay a fine of £70,000. James II. was still more shameless, and in three years went so far as to dismiss twelve judges, and to raise that personification of dishonour, Lord Jeffreys, to the chief justiceship of the King's Bench, to the post of Lord Chancellor, and to that of president of a kind of pseudo Court of High Commission. Sir Edward Herbert and Sir Francis Withers were in 1685 dismissed from the King's Bench on account of their refusal to issue a legal decree at the King's behest; Chief Justice Jones, Chief Baron Montague, and the Judges Charleton and Nevil were dismissed in 1686 on account of their scruples as to the King's power of dispensation, and the judges Powell and Holloway in 1688, on account of their vote in the trial of the seven bishops. On the decisive question of the dispensing power, James first of all obtained a legal opinion as to his power to suspend the Test Act. Then, for the sake of form, a prosecution was commenced against a Catholic officer in the King's Bench, which Court, after the removal of the opposing judges, and with the aid of fresh appointments (among which were those of two Catholic judges), now at length arrived at the decision, that the laws were "the King's own laws," from which the dispensing power of the King was deduced. James called this a simple measure, in order that the judges should be "all of one mind." (2)

With this staff of judges, the political trials were now con-

(2) The appointments to the judicial bench returned with the restoration to the old forms. A monograph on the Constitution under Charles II., by Amos (London, 1857), gives the details of the administrative conditions for the most part correctly, though somewhat exaggerated by the manner of grouping them. After 1665 Charles II. appears to have made use of the long prorogation of Parliament, quietly to reintroduce revocable appointments *durante bene placito*. In quick succession Lord Chancellor Clarendon, Shaftesbury, and Bridgeman, Chief Justices Rainsford, Scroggs, Pemberton, and six justices were dismissed, notoriously for political reasons. Apparently for the same reasons the judges Atkyns and Leeke gave in their resignation (Foss, vii. 4). In the case of Atkyns the reason for his

dismissal was that he had on circuit contradicted the opinion of Scroggs, "that the presentation of a petition for the summoning of Parliament was high treason, and that the King could by ordinance ordain what he pleased." Pemberton's dismissal was followed by the still more scandalous appointment of Saunders. After the death of Chief Justice Saunders, Jeffreys was appointed chief justice primarily for the conduct of the political trial of Sidney. On the occasion of the impeachment of Lord Danby Lord Jeffreys also performed the still more important service of freeing the minister from arrest, on bail, without setting forth any reasons—"the first dumb judgment in Westminster Hall," as it has been called by a later Solicitor-General (Amos 56).

ducted according to instructions from court, and thus were the unsettled principles of high treason, sedition, and the laws and ordinances touching the press manipulated. The chief handle for such action was found in the old indefiniteness of the laws affecting high treason, which indefiniteness was increased by the clause in an Act of 1661, to the effect that "printed matter, writing, sermons or malicious and deliberate speeches" were to be regarded as a sufficient evidence of fact. Just as elastic was the notion of sedition since Clarendon had laid down that the publication of a seditious work was equivalent to bringing an army against the King's throne. Amongst others, the trial of the seven bishops was set on foot on a charge of sedition, the notion of which, to use an expression of Lord Guildford, was of the "nature of soft wax." But most elastic of all was the notion of libel. The interpretation of such notions was supplemented by the press laws of the time. The leading statute 13 and 14 Car. II. c. 33 was only to remain in force for three years, but was twice prolonged until 1679. After it had expired, a new ordinance appeared in the London Gazette on the 17th of May, 1680, and was the object of violent attacks in Parliament. Yet, in the stream of reaction of the year 1685, the old press laws were again revived. In consequence of the large powers appertaining to the judicial office, the criminal sentences, especially for libel, overstepped all bounds. Not only were fines of £40,000 and similar sums imposed, but even lashes with the cat-o'-nine-tails (Johnson, a clergyman, was condemned to 317 lashes for libel, cf. Amos, 258). Judgment was given in favour of the Duke of York for damages of £100,000 on three different occasions.

From this judicial staff proceeded that brutal intimidation of juries, which characterizes this period. The natural result was the passing of the Habeas Corpus Act, and the unconditional acknowledgment of the irresponsibility of juries. In a famous decision of 1679, the courts of common law at length recognized that the jurors were not responsible for the legality of their verdict. Under James II. the acquittal of the bishops, in the face of their prosecution by a despotic monarch, produced a permanent conviction, that in an unanimous verdict there lay the strongest guarantee, which a judicial constitution can afford against despotism and party passion. The whole body of the judges, however, was so corrupt, that, after James's expulsion, only criminal prosecution and dismissal could be resorted to. After these experiences it even did not appear to be easy to declare the judges irremovable by law; rather was the more attention paid to impressing the legality of the Government, not merely upon

the consciences of a number of paid justices, but upon a still broader combination of the judicial office with the propertied classes. (2<sup>a</sup>)

8. *The personal influence of the court upon Parliament, and upon the appointments of other officials, was still extensive, and was exercised by Charles II. in a manner which gained for the Long Parliament the name of the Pensionary Parliament.* Amidst such surroundings it was really difficult to maintain personal integrity in a parliamentary office, or, in party formations, anything like constancy. The list of the recipients of pensions as a sort of official salary, includes the

(2<sup>a</sup>) An impediment to such an administration of justice was still found in the jury. According to a clever plan, which he had continued for years, and in which Chief Justice North, his brother, and a Turkey merchant were employed, together with a third brother, Charles II. by unworthy means succeeded in appointing subservient sheriffs for London, with a view to the summoning of the grand jury. In the correspondence on this subject the name of the object is directly declared to be the removal of that monster which in the years 1680-1682 had raged in the city of London under the name of *Ignoramus* (that is, the ignoring of bills by the grand jury). The question for the Crown was, whether treason and sedition were still punishable in London and Middlesex or not. The details are given by Amos, 266 *seq.* One of the objects of annulling the municipal charters was to remove the independent sheriffs and magistrates, who had to draw up the lists of the jurors liable to serve. In November, 1683, by a jury under the new system, Algernon Sidney was actually brought to the scaffold. In the midst of such a state of things the Act of *Habeas Corpus* was passed, after various attempts at the measure in the years 1668, 1670, 1674, and 1675; cf. Amos, pp. 180-190. Lord Shaftesbury must be regarded as the prime author of this Act. The reason for its acceptance by Charles II. was that he was just about to dissolve Parliament, to attain more favourable elections against the Bill of Exclusion. Under these conditions the bitter words of Marvell at the close of Charles the Second's reign are readily understood, "what French counsel, what standing armies, what parliamentary bribes, what national oaths, and all the other machinations of wicked men had not

been able to effect, was more compendiously acted by twelve men in scarlet" (Amos, 261). But still more shameless does this royal system appear under James II. Lord Chancellor Jeffreys, who may well be regarded as an authority upon such questions, describes his colleagues of that time with his accustomed frankness, "as for the judges, they are most of them rogues" (Foss, vii. 201). The uncongenial task of sketching the life of this Chief Justice, Lord Chancellor, and President of the Court of High Commission, is again undertaken by Foss, vii. 226, *seq.* After James the Second's expulsion not one of the ten justices who were then in office was found worthy of being retained; Lord Jeffreys was condemned to outlawry and the confiscation of his goods, and six others were expressly excluded from the Act of Indemnity. Under these circumstances England learned to appreciate the value of an honorary magistracy in self-government, which granted to the official, in spite of his revocable appointment, a full judicial independence by virtue of property. After the Restoration had removed the oppression which Cromwell's military governors had practised, the judgments of justices of the peace, in spite of the somewhat patriarchal exercise of their powers, and their excessive rigour in dealing with poachers, were still regarded as an upright justice in a corrupt time. Among the abuses by which James II. characterized his short reign, is to be reckoned also the systematic consistency with which magistrates, who had shown a want of complaisance to the intrigues of the court, were struck off the lists, but without any particular result. The office of justice of the peace and the jury passed unspotted into the eighteenth century.



names of the first men of the day. At times there appears to prevail also among the opposition only belief in the material value of money and office, as the one great object of the time. To the great public offices in those days were attached salaries, which amounted from one to two per cent. of the whole State revenue; greater than the income of the richest lords. The struggle for office, acted and reacted upon by the intrigues of parliamentary parties, became thus a struggle for life and death, and round the leading men of the moment were gathered a number of intimate friends, who clung fast like polypi to the State treasury. All that was required for office was a confession of faith in the dominant faction, a readiness to further their nearest aims and ends, adroitness in intrigue, and a quick perception, in order to be able to desery the change of parties at court and in Parliament at the right time. In like manner, the internal administration of this period left behind it the impression, that the trustiness and honesty of the central government were not to be expected to emanate from the Crown and the court, but from Parliament, and most especially from the character of the nation. In opposition to the court party, a "country party" had become formed. The council, though internally broken up, enters, in the persons of the individual and responsible ministers, into more apparent relations with the majorities in the Parliament, in which also the growing participation of the Lower House, especially in the offices of Secretary of State and in the Treasury Commissions, is also visible. (3) The transition to the system of party government is throughout visible.

(3) The general character of the administration and the bureaucracy may be explained by the deeply rooted animosity displayed by the parties, between which the bureaucracy stands without finding any support in the Crown. It is characteristic of the programme put forth by each party that the name of the King and the will of God have never been more common in the mouths of men of political and ecclesiastical authority than under this dishonourable system. The character of the politicians and officials of this time is described by Macaulay in his "History," chap. ii., as follows: "Their character had been formed amidst frequent and violent revolutions and counter revolutions. In the course of a few years they had seen the ecclesiastical polity of their country repeatedly changed. . . . They had seen hereditary monarchy abolished and

restored. They had seen the Long Parliament thrice supreme in the State, and thrice dissolved amidst the curses and laughter of millions. . . . They had seen a new representative system devised, tried, and abandoned. . . . They had seen great masses of property violently transferred from Cavaliers to Roundheads, and from Roundheads back to Cavaliers. During these events no man could be a stirring and thriving politician who was not prepared to change with every change of fortune. . . . One who, in such an age, is determined to attain civil greatness must renounce all thought of consistency. . . . He catches without effort the tone of any sect or party with which he chances to mingle. . . . There is nothing in the state which he could not, without a scruple or a blush, join in defending or in destroying. Fidelity to opinions and to friends seems to him mere dulness

## CHAPTER XLII.

*The Expulsion of the Stuarts.*

IN the miserable state of the epoch of the Restoration, the first symptoms of an amelioration became apparent in the life of the communities in town and county. Firstly, it was the old landed gentry, rough, stolid, and full of prejudice, but yet full of zeal for the honour of the nation, in whom indignation at such a method of government found expression. In the boroughs, the oppressed puritan spirit gradually began to stir. The royalist party had wished to restore an ideal taken from England's past. Their ideal of a monarchy was derived from the glorious days of good queen Bess; instead of these, a Stuart had been restored with a corrupt court and an unprincipled bureaucracy. There were many who still believed that the King was only entangled in the meshes of a small number of wicked men, and thus estranged from his faithful people, and that the deception could not last. But yet it lasted, and a bad ministry was succeeded by a worse. Every exclusive acquisition of power by any party was followed by a period of disappointments. The neglected Cavalier, the

and wrongheadedness. Politics he regards, not as a science of which the object is the happiness of mankind, but as an exciting game of mixed chance and skill, at which a dexterous and lucky player may win an estate, a coronet, perhaps a crown, and at which one rash move may lead to the loss of fortune and of life." The wretched state of affairs that ensues, and observation of the fact that by the dissolution of the council only the influence of Parliament was enhanced, appears in 1679 to have obtained a hearing for Sir W. Temple's plans of reform. The council is for the future to consist of thirty members, of whom one-half are to be high state officials; the other half to be appointed from among the chiefs of the opposition, both in the Upper and in the Lower House. The members shall have a joint income of

£300,000, in order to "balance" the Lower House, which was at that time estimated at £400,000. As a counterpoise to both court and Parliament there shall accordingly be formed again a standing political body, and the statesmanlike originator of the scheme hoped that the responsibility of the business and the deliberation would again engender a corporate spirit. But for an active governmental body, the number of the members was too large; at all events the attempt after three such reigns came too late for England. Neither the King nor the parties were in earnest. There was at once again formed of this council a secret committee, and the whole institution had after the lapse of a year nothing more than a nominal existence (Ranke, v. 101 *seq.*; Macaulay, *Essay on Sir W. Temple*).

persecuted Presbyterian, and the dismissed officer of the army, had each his own peculiar grievance and found himself in a worse position than ever before. Charles the Second's government was not modest in the demands it made upon the taxpayers. Of the employment of the people's money, of the negotiations with foreign countries, of the immoral state of things at Westminster, enough was heard in the counties to awake a strong mistrust. Such feelings could only indirectly and sporadically affect Charles the Second's Long Parliament by means of by-elections; but, from the year 1665 on, they gradually increased, and showed themselves in the judicial proceedings. Attention was more drawn to the abuses of the administration, national grievances again revive, and impeachments of ministers and high officers return again, and down to the close of the period have attained the hitherto unheard-of number of forty. It is the perennial spirit of legality and equity, which is ever renewed in the independent activity of this nation, and in the daily exercise of the magisterial office, especially in the judicial and police administration. In the social life of the community, that party spirit, which separates the established churchmen from the dissenters becomes gradually quieted down. Both are still united in their detestation of papistry, that irreconcilable foe of the Established Church and of the parliamentary constitution. The royalists acknowledge, though with much reluctance, that their non-conformist opponents may still be "religious men" and good subjects. In opposition to the abuses of the administration, a sense of legal liberty again returns in the Parliaments of 1679 and 1680, which reminds us of the commencement of the Long Parliament of 1640. Disregarding the doctrines of Oxford, the Parliament again demands a government "according to law." The servants of the King must obey the laws; the King must neither excuse them from observing the law, nor pardon a minister who has been condemned for its violation. The taxes must not only be voted by Parliament, but their employment also be regulated and controlled by Parliament. No one must be arrested except upon special and legitimate grounds, nor detained in arrest except by the decision of a judge, nor condemned otherwise than by the verdict of an independent jury. Amidst all the changes and intrigues of parties there is preserved a spirit of civil liberty, which with the Habeas Corpus Act, the irresponsibility of the jury, the right of the Lower House with regard to the budget, and the struggle against a censorship of the press, enforces a new Magna Charta, which is this time won not by the barons, but by the wider circle of the gentry, and mainly by the Lower House. With civil order the sense

of civil liberty returned. After the extreme parties both in Church and State, under bloody Mary, Strafford and Archbishop Laud, Cromwell and the Puritan army, had become worn out and had finally shown their impotence, more liberal ideas at length established the opinion, that conceptions of God and of divine things and political conceptions of the civil power should be subjected to no absolute veto by the censorship of the press. The abrupt change in its application at last overcame the censorship in principle, so that it is from henceforth only retained by Crown and Parliament as an exceptional measure, to be applied under extraordinary circumstances.\* It is this spirit which, in spite of all party errors, both internally and externally, at least strives after what is right, and which makes this time an era of "good laws and bad government," as it has been called by Fox. But the right bounds are once more overstepped.

The bill for the exclusion of the Catholic succession, agitated for by the minority, led after 1681 to dissension and reaction. The opposition had boldly advanced so far as to threaten the hereditary monarchy. And here for the first time that party agitation which has periodically repeated itself down to our times becomes prominent. It developed a hitherto unheard-of election struggle, in which the rival parties figure as *petitioners and recusants*. The party passion of the opposition called the royalists Tories, a word derived from a Catholic party sect among the common people in Ireland; whilst the country party called their opponents Whigs, a name taken from a low and extreme class of covenanters. Men

\* Its application in the reverse direction caused the fall of the censorship of the press in England. Charles the First's *Cæsaro-papism* had introduced the most comprehensive system of press laws by decrees of the Star Chamber of the 11th of July, 1637. In the war against Charles I., however, the Long Parliament continues the practice of the Star Chamber. In the year 1643, similar ordinances were issued by both the antagonistic Parliaments, and censors appointed. After the King's defeat, Lord General Fairfax and, in later times, Cromwell carried out the ordinances of Parliament. In 1653 an order of council enjoined that no public news or communications should be published without the leave and approbation of the Secretary of State. In 1654 and 1656 new commissions were appointed, with more rigorous measures against political writings, by which, however, Cromwell endeavoured to moderate the thirst for

persecution in religious matters. After these rules had been enforced for twenty years in an adverse sense, a statute 13 and 14 Charles II. c. 33, with a rigour which is characteristic of the Restoration, essentially repeated the ordinances of Parliament relative to the printing licences. The number of master printers was restricted to twenty; they must give security, and on demand of the censor give up the name of an author. The printing places for books are London, York, and the two university towns. This law was only to remain in force two years, but was twice prolonged until 1679; and then by ordinance of the 17th of May, 1680, it was again renewed after violent opposition in Parliament; then in the reaction of 1685, it was again prolonged for a further period of seven years; finally, for two years, by 4 William and Mary, c. 24, until 1694, in which last-named year the censorship was finally extinguished.

soon became accustomed to these mutual nicknames, chosen in the heat of the struggle by each party for its opponents, and they have been retained down to the present day. The supporters of exclusion (petitioners), however, are in the minority, attacking as they did the basis of the prerogatives and the source of the privileges of the upper classes. The clergy, deeply interested in the question, wage an actual crusade against these principles. Once more the doctrine of passive obedience, of the unchangeable hereditary right of the Crown, of the divine origin of the patriarchal descent of the monarchy, resounds from every pulpit. The London Gazette is again full of addresses of loyalty. The Crown quickly took advantage of this favourable turn of events, to strike a decisive blow at the municipal constitutions, which at that time were considered as the chief impediment in the way of the influence of the court upon the Lower House. Instead of encountering a real evil in a legitimate way, the Stuarts preferred to make confusion worse confounded by attacking the internal life of the towns, and made use of the corrupt benches of judges for the purpose of annulling the municipal charters. The judgment passed on London was followed by similar "informations" against other towns; most of the towns anticipated the attack by voluntarily surrendering their charters, in the place of which they received new ones "after a conservative pattern." The justices of assize especially abused their official powers to this end. Jeffreys, on the northern circuit, "made all charters fall before him like the walls of Jericho, and returned to London laden with surrenderings, the spoils of the towns." \*\*

\*\* The position of the parties on the accession of James II. requires some explanation. The specifically royalist party of this period had as an extreme agitating background the Roman Catholic faction; the radical opposition contained the remains of the republican party. In order to gain influence with the landed classes, which for the most part were attached to the present constitution, the one party had been obliged to emblazon the "Monarchy," the other "Protestantism," upon its standard. These powerful watchwords never failed in their effect at elections. The efforts of the opposition, which now demands civil freedom and protestant tolerance, are personified in men like Shaftesbury, William Russell, and Algernon Sidney; of whom the two last named, through the judicial murder contrived by Charles II. himself, became martyrs to the liberty of

their country. But this opposition had to contend with the great difficulty that the treasonable proceedings at court, and the plots to overthrow the Established Church, were only known to the leaders, and to these only in part; that the high church party would not believe in them; and that they could not be clearly and in detail laid before the constituencies. The opposition had in this critical position and in its extravagant ardour, made serious mistakes. Not particular as to the means it employed, it successfully utilized a papist plot, which Titus Oates and his accessories took the trouble to detect, as a means of agitation. But the perjured witnesses were followed by a number of perjured counter-witnesses; this trumped-up means was no longer believed in, and in consequence the party lost credit in the larger circles. The daring plan of

Amidst this movement, James II. ascended the throne, under circumstances which remind us of the accession of Mary Tudor. The great majority of the people were satisfied that the regular hereditary succession, and not the adventurous plans of a new doctrine, had gained the victory. James's first addresses caused great joy in the breasts of those who now called themselves "the faithful portion of the nation." The University of Oxford promised once more obedience without any limitation or reservation. The House, elected under the influence of the new charters of corporation, declared any bill in Parliament for changing the succession, to be high treason, and after the suppression of the Monmouth insurrection voted £700,000 for a standing army. The loyalty of the landed gentry, the submission of the intimidated municipal corporations, a standing army with a submissive corps of officers (for the most part Irish and English Catholics), an unconscientious and servile bench of judges, the high church clergy with their article of faith of *non-resistance*, and the disunion of Protestant sects among themselves,—all these disclosed a prospect which was decidedly not unfavourable. But, all the same, the campaign against the municipal corporations, the intimidation and the systematic appointment of "well-affected" persons to the civic offices still continued. The triumph which James celebrated over the ill-advised insurrection of Monmouth, brought his personal plan all the sooner to maturity—the plan of rewarding the attachment of his people by the overthrow of the constitution.

The events under Charles I. had proved indisputably that England did not tolerate spiritual and temporal absolutism at one and the same time. But James was of the opinion that so soon as the authority of the Catholic Church should have been restored, a new generation could be educated by Church and school to bring back the people to unconditional obedience to the temporal head-shepherd. "I would rather

their leader, Shaftesbury, to exclude the Duke of York from the succession, and in his stead to place the vain, weak-minded bastard, Monmouth, upon the throne, was too Quixotic. By this device all those adherents, who regarded Mary (the wife of the Stadtholder of the Netherlands, afterwards William III.), as entitled eventually to succeed to the throne, felt themselves with reason aggrieved. Besides, the succession of James, who, being only a few years younger than Charles II., was as likely as not to predecease him, seemed at that time quite hypothetical.

The immoderate agitation for the Bill of Exclusion accordingly could not fail to arouse the just mistrust of all, who now, after their experiences of the republic, cleaved to the hereditary monarchy with redoubled zeal. By these mistakes the opposition had, in 1681, brought about that reaction, which rendered the first systematically Tory party government in England possible, and which now directed its attacks openly against the strongholds of the opposition in the municipal constitutions.

have the papacy, because it has so much power over men's minds, if only the Pope did not also demand power over kings," had once been the opinion of James I. " His grandson conceived that he could divide the absolutism by restoring to the Pope the spiritual half. Hitherto their court theology had supplied to the Stuarts the place of the Jesuit father-confessors, who had, by their absolute ignorance of the rights of nations, brought the dynasties of the Continent to destruction. James II. thought, after the manner of converts, that he ought to drink of the pure waters of Jesuit counsel and advice. He had certainly solemnly sworn to uphold the constitution of Church and State and the rights of the clergy, but his Jesuistic morality whispered to him that these privileges, which had been sworn to, were the very same that Edward the Confessor had accorded, and " no one would doubt that Edward was a Catholic."

In the meanwhile the line of attack upon the constitution of the country by the legislation under Charles I. and II. was not only materially narrowed, but the object of the attack had become an essentially different one. The Anglican Church had issued from the struggle against papists and levellers strengthened in its nature; it had now become bound up with the feelings of the dominant class and of the nation, as being a Christianity that harmonized with the common sense of the people; it had made peace with Parliament, and had become the standard of the royalist party, both in and by the Restoration, and moreover, it was strengthened at all points by constitutional laws. In another direction, owing to the development of self-government and the rights of Parliament, the dominant class had become much more powerful and capable of resistance; the whole of the legal armed forces of the country and their equipment had been placed in the hands of the dominant class, with which a hired army could not compete, in consequence of its want of a fit corps of officers.\*\*\*

The opening, which James thought he had nevertheless found for the realization of his plans, lay in the ecclesiastical

\*\*\* Cf. concerning the new militia, as being the army of the propertied classes in town and county, the description given above, p. 582, note. Charles II. had planned the formation of a rival force of hired troops, the so-called guards, but these, in consequence of his constant pecuniary embarrassment, could not attain any importance. The troops which were hastily got together by James II. (the so-called "blackguards" in popular

language), under papal officers, found themselves completely isolated amidst a population that was in no wise defenceless. In many counties the militia could actually be still mobilized; all the arsenals were in the possession of the landed gentry. Any attempt at a struggle would scarcely have left the "blackguards" the possibility of a retreat like that of Xenophon.

supremacy and in the royal dispensing power. The last-named prerogative was regarded as an undisputed right of pardon in criminal offences, and its extent beyond this was, according to old precedents, uncertain; but it was most doubtful of all in the province of ecclesiastical legislation, in which the intervention of Parliament was of recent date and only exercised amid violent struggles. The limits of the constitution appeared to afford him here scope for action. Though no minister and no judge could be found who dared assert that a positive legislative power to alter the common law and the temporal statutes resided in the King, yet there were still to be found both councillors and judges who decided in favour of a negative prerogative, by which the whole ecclesiastical legislation, and with it the constitution of the Anglican Church, might be dispensed away at will. James thought he had gained the requisite power for "dragonades" in his standing army, with its Catholic officers; the means of keeping up this army having been voted by Parliament itself, after the suppression of the insurrection of the Duke of Monmouth. By means of an illegal ecclesiastical commission, with Lord Jeffreys at its head, the King thought to gain a disciplinary power sufficient for Catholicizing the national church. Everywhere we meet the Catholic system; monasticism and the ecclesiastical garb begin once more to peer forth. At last, by ordinance under the name of a "declaration of the liberty of conscience," the Established Church is abolished.

Well arranged as these measures might be according to the Jesuit doctrine, yet, when measured by the substructure of the English constitution, and by the legal and dominant position of the estates and Church in England, their utter perversity and futility becomes apparent. The established clergy, in their ecclesiastical and political position of influence, the old gentry in their attachment to the "Church of England" and to the militia system, the towns with their Puritanical reminiscences, and the whole nation in its jealous pride in its national church, were all mortally offended. The first symptoms of resistance in the very party of *non-resistance*, the opposition of the bishops, ought to have warned the King in time. But James, inflexible, a fanatic in his belief in the infallibility of Jesuit counsels, a pessimist in his estimate of men, hard and obstinate even to fatuity, persistently follows his aim.†

† Absolutism was before all incompatible with the Established Church. James II. offended, in the first place, the Established Church party by the

re-establishment of a Court of High Commission, against the plainly expressed rules of law. Just as unequivocally directed against the Tories



The consequence, apart from the dramatic details, was the coalition of both the great parties, of those who held the theory of resistance and of the non-resistants, into an actual armed resistance; the summoning of the Prince of Orange; the flight of the monarch, whom all forsook; the summoning of the "Convention Parliament;" the transfer of the crown (which had now been declared "vacant") to the Prince of Orange; and the formal arrangement as a compact between the Prince and the Parliament, by which all previous encroachments of the prerogative made up to that time were declared to be illegal.

To the present day a feeling of the legality of this act, called by the name of "the glorious revolution," still lives in the consciousness of the nation. "Nothing," says Hallam, "was done by the multitude; no new men, either soldiers or demagogues, had their talents brought forward by this rapid and pacific revolution: it cost no blood, it violated no right, it was hardly to be traced in the course of justice." In short it

was the suspension of the county militia, and the systematic disarming of the propertied classes. Sixteen lord-lieutenants were dismissed from office, and twelve of these places, as well as one-third of the sheriffs' offices, were filled by Catholics. But the suppression of ecclesiastical legislation by a so-called right of dispensation was a crushing blow, invalidating the enforcement of all laws which had been passed for the establishment of the Anglican Church, declaring all contraventions of them unpunishable, and the oath of supremacy and the provisions of the Test Acts touching the appointment to public offices no longer requisite. Already under Charles II. an attempt had been made to issue a *declaration of indulgence*, which was intended to work in the spirit of restoration, in favour of the Catholics, and not in favour of the Protestant sects. But that declaration, with the usual caution of that reign, had been kept within the forms of a royal right of pardon, and was recalled at the first serious remonstrance of Parliament. The declaration of James II., on the other hand, appeared as a direct abolition of the ecclesiastical laws, by virtue of royal supreme power, and this offensive expression was actually employed in the declaration which was issued for Scotland. The declaration of James II. was based upon the Jesuit maxim, which at all times appeals to the principles and laws of civil

"liberty," and even asserts the most advanced principles of "popular sovereignty" against governments and national laws, in order to remove all the barriers of ecclesiastical power, in order, after the removal of these barriers, to rule with all the coercive means at its disposal. The Anglican clergy was enlightened as to the meaning of the declaration, after its experiences of the papal clause "*non obstante*." The legal profession was not, indeed, as yet quite clear as to the exact boundaries between the acknowledged right of pardon residing in the Crown, and a systematic invalidation of the legislation of the land by royal supreme power. But the demonstrative appearance of the Catholic monastic costumes in all public places made the significance of the question patent to all. The union of the two great parties was a necessary consequence. It was certainly a marvellous fate, which forced the most zealous preachers of passive obedience to furnish the first example of disobedience. The seven bishops who petitioned against the declaration were arraigned for sedition, but acquitted by the jury, and among the clamorous rejoicings of the people on account of this acquittal, which even carried away with it the "blackguards," the open insurrection breaks out; the flight of the King, and the further steps of a change in the succession follow each other rapidly.

was an event which "united the independent character of a national act with the regularity and the coercion of anarchy which belong to a military invasion."

The "gloriousness" of this revolution is not to be sought so much in the martial deeds of the men who brought it about as in the political wisdom and prudence of the parties which united together to form it. As in olden times at the period of Magna Charta the two great parties of the Middle Ages, prelates and barons, united together in harmonious co-operation, as in the Restoration of 1660 the Presbyterian party had been obliged to help the Royalists, so the Tories in 1688 were obliged to aid the Whigs in expelling the Stuarts. This revolution was not founded upon any party programme, but upon the recognition of common rules and conditions, within the limits of which both parties for the future will move. The ground upon which the two opposite political ideals now met in harmony was the demand for a government of State and Church according to the laws of the land. Upon this common ground both parties succeeded in formulating a code of principles, according to which the government of the country was for the future to be undeviatingly carried on. This code was drawn up in the following thirteen clauses of the "Declaration of Rights :"—

1. That the pretended power of suspending laws, and the execution of laws by regal authority, without consent of Parliament, is illegal.

2. That the pretended power of dispensing with laws, or the execution of laws by regal authority as it had been assumed and exercised of late, is illegal.

3. That the commission for creating the late Court of Commissioners for ecclesiastical causes, and all other commissions and courts of the like nature, are illegal and pernicious.

4. That levying of money for or to the use of the Crown, by pretence of prerogative without grant of Parliament, for longer time or in any other manner than the same is or shall be granted, is illegal.

5. That it is the right of the subjects to petition the King, and that all commitments or prosecutions for such petitions are illegal.

6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with the consent of Parliament, is illegal.

7. That the subjects which are Protestants may have arms for their defence suitable to their conditions, and as allowed by law.

8. That elections of members of Parliament ought to be free.

9. That the freedom of speech or debates, or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.

10. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

11. That juries ought to be duly impanelled and returned, and that jurors which pass upon men in trial for high treason ought to be freeholders.

12. That all grants and promises of fines and forfeiture of particular persons, before conviction, are illegal and void.

13. And that, for redress of all grievances, and for the amending, strengthening, and preserving of the laws, Parliament ought to be held frequently.

These were in the main exactly the points in which the royal rights of Government had in the last decade been successively abused, as was set out point by point in the preamble.††

These articles presuppose and once more set forth in a declaratory form the national foundation of the English State, as it had been built up from Norman times, and as it, since the Reformation, had subordinated and incorporated the Church. They treat of:—

The Crown as the source of all powers ;

The legal tribunals as a limitation ;

Legislation as the supreme regulator of the government.

All political powers proceed from the Crown, and remain centred in the Crown (*tout fuit in luy et vient de lui al com-*

†† The Declaration of Rights concludes with these categorical words, which express the character of constitutional principles, "and they do claim, demand, and insist upon all and singular the premises as their undoubted rights and liberties; and no declarations, judgments, doings, or proceedings, to the prejudice of the people in any of the said premises, ought in any wise to be drawn hereafter into consequence or example." The rules thus formulated, which, as a code of fundamental rights, or as a declaration of human rights in general, would certainly be very deficient, are significant when read in connection with the customary principles and laws as to the exercise of royal sovereign rights. They relate to the points that have to some extent been left undecided in the military power (6 and 7), judicial power (8, 10, 11, 12), police power (5, 10), financial power (4, 12), and eccle-

siastical power (1, 2, 3) of the King. They were laid before the Prince of Orange in the manner of a treaty to be signed as a preliminary to his election, and it was only after they had been accepted by both Houses under the name of the "Declaration of Rights," had been read, acknowledged, and accepted by the Prince, that the proclamation of the new monarchy was made on the 13th of February, 1689. In the Act of Parliament incorporating the Declaration, a modification was proposed respecting the illegality of the dispensing power of the Crown. In the same session a new statute was to be passed, regulating the limits of a permissible exercise of such a power. This statute was, however, never passed. With regard to the change of succession, the parties united in framing a formula which represents James the Second's action as an abdication of the throne.

mencement), but they are moderated by the limits imposed by the Crown itself, which bind the King for *the past* to the common law, as established by usage, to his own laws, and to the laws of his predecessors; and for *the future* bind him by the necessity of the consent of the two Houses of Parliament to every change and to every deviation from the law thus established. This was a laying down of the principles of government, as yet unattempted in the history of nations, and which left to generations to come the problem (below, Chap. liii.) to solve, whether a political government under such conditions was capable, at any given time, of satisfying the real needs of the State and of society.

In the struggles of the century, in all the infinitely complicated phases of the conflict, the internal contrasts of the political system of the nation have successively in all their varied stages been presented to the eye, in a manner that appeals to the understanding and the mind in their very inmost core. In this conflict, the events of the Middle Ages, both in Church and State, are once more revived as an inexhaustible material of controversies for both sides. The same treatment was applied to the doctrines of revealed religion. For the intellectual life of the nation the period is one of a gigantic advance towards self-consciousness as to political topics and things of general human welfare. But what characterizes these party struggles is their immediate practical bearing upon the State and its administration. The appreciation of that which is essential, which was possessed by the nobles at the time of Magna Charta, returns in the present generation on a higher scale. In Cavaliers and Puritans, in Hobbes and in Locke, are reflected the practical experiences of the actual State. The training exercised by local government with its common centre in Parliament gives the different parties the power of comprehending the State under all conditions, and an effectual influence upon the State. The habit of communal life and its purifying moral power, from the lowest strata in the State upwards, casts off once more that corruption which the court of the Stuarts had propagated. In marvellous contrast to the later revolutions on the Continent, in which enthusiasm for the idea of liberty engenders violence and subjection, in England the era of the wickedest royal family, of the most corrupt court, and at times of the most corrupt Parliament, becomes the era of great laws, which form the foundation of the political and moral liberty of the people. The struggles which have been carried on within this constitution, between the great factors of political life, will remain for all future times fruitful precedents, which European society has won; a lasting and durable gain for

the recognition of the first principles of political liberty. At the close of the period certain unassuming alterations in the factors of the executive power are seen; otherwise, a century of revolutions and restorations has passed by, without apparently leaving any traces in the permanent bases of the State, in local institutions, and in the mutual relations of the estates of the realm.

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### CHAPTER XLIII.

#### *The Conditions of Society at the End of the Seventeenth Century.*

WITH the period of the Tudors and Stuarts another era of six generations has come to a close; a period of time, which in the Middle Ages almost exactly marks the epochs, in which the great revolutionary changes of society in the European civilized world are accomplished. Under reformation and revolution, the organization of society into Estates has again proceeded on an undisturbed, unvarying course, that must be once again examined in this place, seeing that it is the fundamental basis of the now fully developed parliamentary government of the eighteenth century.

The multifarious transformations of the communal system, the more lively activity of the upper and middle classes in the parish as well as in the district, in conjunction with the flourishing condition of agriculture and the rise of commerce and trade, have brought about an upward movement of classes, for which the breaking up of the power of the great martial barons had made room. In the gradations of society at the close of this period it must be understood, that the middle class of the earlier constitutional period now takes its place as "gentry" beside the lords, and the former enfranchised "third estate" now takes the place of the middle classes—each class having in a certain sense advanced one degree higher.

1. *Lords and gentry* have, in this period, gradually come so close to each other, that the hereditary peers of the realm no longer stand alone as a separate ruling class, but have become an hereditary nobility within a much more numerous dominant class, which is fairly distinguishable under the designa-

tion "gentry" given to it in legal language, as in that of the herald's office and of everyday life.

The influences of property have in the first place at the commencement of the period become in a great measure changed, owing to the fact that the old honours of the princely peers, which were confiscated under Edward IV., were not regranted in the old fashion, but in parcels and with diminished revenues; and that, in another direction, hereditary peerages were more and more granted to landowners, whose lands, whether acquired by descent or by regrant, especially from former monasterial estates, were very different from the old "baronies," which were ordinarily continued, in the Exchequer, under the name of "honours." In these estates there was no longer any connection with a neighbourhood in which gentlemen and tenants were wont to regard themselves as retainers of an old "worshipful lord." They were estates like many others of the freeholding knight-hood. In consequence of the development of the times, which was seldom disturbed by external wars, and in consequence of the lively intercourse with the towns, which were now rapidly becoming wealthy, the revenues from the lands of the landed proprietors, who came next after the nobles, had increased to a considerable extent. When in 1640 the Long Parliament was convened, the income of the members of the Lower House was computed at £400,000, and their estates at three times the extent of those of the lords. The estates of the lords spiritual in Parliament appear to be considerably diminished, in consequence of the secularizations; and the few newly created bishoprics were not endowed with the old rich landed possessions.

But, together with the relations of property, the legal position of the nobility in the county and local unions had become altered. The former importance of the barons as personal lords of a martial retinue had long since ceased. All the duties of the landed estates, formerly discharged in the public interest, together with their influence, now falls upon the militia and police administration. The high honorary offices now occupy the position that the *seigneurs* of the Middle Ages had filled. Their influential participation in State functions now lies in the first place in the commissions of peace, which for the most part are filled by the same individuals as compose the staff of the militia organization. The habitual form of these commissions was accordingly certain in the long run to determine the legal conceptions of rank, as the feudal militia system had formerly done. But the commission of peace included, as its chief constituents, the great landed proprietors of the county; the appointments to

it, in fact, passed almost as certainly from father to the first-born son, as did the landed estates. At the head of the commission stood regularly, as *custos rotulorum* (who was at the same time ordinarily made lord-lieutenant of the militia), a temporal lord of Parliament. The number of lords was maintained under the Tudors in a certain proportion to the number of the counties, so that a seat in the Upper House and a commission at the head of the county administration generally went together. But in the last-named capacity the hereditary noble and counsellor of the Crown only appeared as *primus inter pares*, with similar official duties and rights. In spite of all deference to "my lord," this was a very different position to that when the great baron held his court with his retinue. The idea of a mere precedence takes the place of the old idea of subordination and personal fealty.

In the period of the Stuarts this new view finds expression in the considerable number of elevations to the peerage. (1) In the period of the Tudors the total number of peerages had been raised to the maximum of 59. But James I. went so far as to make 62 new creations, Charles I. 59, Charles II. 64, and James II. 8, altogether 193, which, after deducting 99 extinct peerages, gave a total of about 150 temporal peers.

(1) As to the newly created peerages and elevations under the Tudors, cf. above, p. 473. In the time of the Stuarts this number increased to 98 under James I., to 130 under Charles I., to 137 under Charles II., and to 11 under James II.; altogether 376 under the Stuarts, as against 146 in the days of the Tudors. The reigns of the Tudor dynasty brought about on the average one change in the peerage in every year, that of the Stuarts three. James I. created 62 new peers, Charles I. 59, Charles II. 64, James II. 8; altogether 193. (In the following century, from 1700-1800, there were created 36 dukes, 29 marquises, 109 earls, 85 viscounts, and 248 barons.) At the commencement of the Long Parliament it was computed (Rushworth, ii. 1156) that about two-thirds of the earls and barons who had been summoned had only been created within the last generation. James I., as has been already mentioned, for a time offered the dignities of a baron, a viscount, and an earl for sale, for £10,000, £15,000, and £20,000 respectively, which offer was taken advantage of in a single year by four earls (Franklyn's Annals, p. 33). With their unkingly method of government, the frivolous distribution

of the highest dignities in the State also increased under his successors. It is true that besides the English gentry many Scotch peers were also received among the number of the English lords; but the Scotch peerage, too, was also enriched under James I. and Charles I. and II. by 214 new creations—more than are met with in the whole Scotch history from Malcolm III. downwards. That Charles I. when in dire need, in 1640, once more summoned the peerage to him in the form of a *Magnum Consilium*, was only an anachronism. The Houses of Lords and Commons had long since become combined into one great body, and could, in the present constitution of the State, be no more parted than could office and tax. After the events of the last hundred years the lords had lost not merely the influence of their possessions, but also so much moral respect, that they could not possibly now, together with the royal cabinet, form a special and separate constitutional body. They accordingly declared themselves to be incompetent. On that very account the lords form no longer a factor in the civil wars, but are divided like the gentry between two camps and two Parliaments.

Their number was in itself sufficient to determine the new view which began to regard the peerage as an hereditary *precedence* among the gentry granted by patent, and not as a dominant class *per se*. The Restoration completes this political position, and that, too, contemporaneously with the total abolition of feudal tenures by 12 Charles II. c. 24. With the conversion of feudal estates into socage, the full powers of devise over landed estates return. Already by 32 Henry VIII. c. 1, and 34 Henry VIII. c. 5, the landowner had been empowered to dispose by will and testament of two-thirds of his lands held in knight's tenure, and of all his lands held in free socage. By the conversion of all knights' fees into free and common socage, the latter became now the general mode of tenure. (1\*) There still were to be found at the head of the peerage some few families with truly princely possessions, and boasting royal blood; but in the main the English nobility had already become an "elevated gentry."

But this gentry extends in every generation with the landed possessions and with the public offices, upon which it is based. Its marrow was at the close of the Middle Ages: the freeholding knighthood, whose estates, in spite of their liability to alienation, could be preserved fairly intact by the law of primogeniture and entail. On the other hand, under Henry VIII., the law as to the liberty of devise by will, and in the seventeenth century the civil war, had led to multifarious changes of ownership, in consequence of which the rich municipal classes enter into possession in great numbers. The new owners pass through the commission of the peace and Parliament, at first politically, and then, after a certain time, socially also, completely into the ranks of the old gentry. But as commissions of the peace and Parliament also include municipal dignitaries, it came about that these were in ever greater numbers admitted into the ranks of the gentry. The honorary designation of *esquire*, which at the close of the Middle Ages was only granted in isolated cases, broadens out and includes the rich civic class of liberal education and occupation, almost within the same limits within which these

(1\*) In harmony with this living form of the estates the feudal *nexus* was abolished as a completely antiquated institution. James I. and Charles I. had negotiated with Parliament on the subject. The Long Parliament had (Feb. 24th, 1645) directly abolished all feudal burdens, and the Restoration found in this one of the few points which could be accepted from the revolution without any reservation. The statute abolishing this *nexus* (12

Car. II. c. 24) has as truly radical a form as a statute for the abolition of feudal tenures can well have. All feudal tenures are for the future expressly declared to be held upon "free and common socage," and merge with the urban freeholds into an indistinguishable mass of freehold. It was also declared that "all future grants of land by the King should be in free and common socage."



classes were wont to seek and find admission into the commissions of the peace. As a matter of course the old beneficed clergy kept their old honorary rank, combined with numerous appointments to the commissions of the peace, and to these were added also the higher class of lawyers (the *quorum* of the commissions of the peace), physicians who had studied, and the higher civil and military officials. With almost excessive liberality, the somewhat lower predicate *gentleman* was given in ordinary life. (1<sup>b</sup>)

Thus, both in State and society a first class of considerable extent has become formed, partly with personal and partly with higher hereditary designations of honour. Within the highest degrees of the peerage there extends a higher rank down to grandchildren; within the lower degrees, and among those eligible as knights of the shire, to the sons. It is not the family with all its descendants, but only the owners of the family estates, and the vocation to public activity involved therein, who receive the legal or customary title. Pecuniary embarrassment caused James I. to increase these honours by the hereditary dignity of a baronet, which, differing from the general English rule, is a mere title with no public duties attached to it. Under the Stuarts this dignity was granted successively to nine hundred persons, and be-

(1<sup>b</sup>) The equality in rank accorded the dignitaries of the towns with the titles of esquires and gentlemen dates principally from the days of Henry VIII. This was the time in which the word *gentleman* began to be used almost in the modern sense "which distinguishes the gentleman legally from the noble, and morally from the uneducated plebeian" (Mackintosh, *Hist.* i. 269). The inclusion of the citizen worthies still slowly increases. The rich citizen, the banker and merchant, the alderman of the larger cities was reckoned to this class almost without question. The commission of peace for the county and the towns was a general standard for the "*rathsfähige*" classes, as they have been called in German cities. Large estates, education, and customary service in the magisterial offices are here, as among the landed gentry, the distinguishing feature. For this reason the retail tradesman, the dealer, and the artisan were not reckoned among such, even when they actually surpassed in wealth many a country noble. Habitual activity in an honorary position in the militia, in the court (commission of peace), and in the Church (by

learning) forms the common bond of the gentry, within which, however, the pretensions of old birth, great estates, and high office by hereditary dignities, titles and precedence make themselves felt. In this spirit, from the time of Henry VIII., there arose by law, by the practice of the courts and the herald's office, a very comprehensive table of precedence, which is closed by the general headings esquires and gentlemen, within which rank a very numerous body of persons is conspicuous by birth, dignity, and office as a more distinguished class (Gneist, "*Adel und Bitterschaft*," pp. 47-50). Gradations which now appear to us pedantic have in their day served to satisfy the pretensions of the older distinguished classes so far as they were content with the moderate right of precedence, and did not aspire to be made a separate caste. The narrower definition of gentry in the books on heraldry, and which is different from that given in the law books, certainly brings precedence by birth much more prominently into the foreground. But these books have never had any influence upon political life.

came a kind of middle degree connecting the peerage with the wider circle of gentry. (1°) At the close of the period the average income of a peer was usually assessed at about £3000, that of a baronet at £900, and that of a member of the Lower House at £800.

II. *The enfranchised freeholders of the counties and the enfranchised citizens of the towns* now appear, after the gentry has been thus raised, as politically entitled to be called the middle class. The old line of demarcation, according to which the classes which habitually discharge the duties of jurors, that is, the forty-shilling freeholders, also help to form the enfranchised body, has been retained unchanged in the county. There is added, moreover, to these the service of constables, churchwardens, and overseers of the poor and of highways, which do not fall under the same qualification, but as a matter of fact, ordinarily keep within the same classes. There are added, moreover, the poor rates, which have now become considerable, and the highway and bridge-building burdens, to which these classes contribute large amounts. Almost the same relation exists in the militia service. If, with regard to these, the franchise had been lowered, it would, on the other hand, have been necessary to raise it again; for by stat. 27 Elizabeth, c. 6, the qualification for jurors had been doubled. On the whole, the rate of forty shillings, however, still answered to the average calculation of personal service. There was, accordingly, no inclination evinced to alter the old valuations in any way. (2)

(1°) The hereditary title of baronet was intended to a certain extent to take the place of that of banneret, which was for the last time granted at the battle of Edgehill, 1642. According to the original statutes, the new dignity was as a rule purchasable for £1095, but regard was to be had to good family, to the descent from persons who bear arms from their grandfather on the father's side, and who have an annual income of £1000, which was specified more in detail. As, however, it was not very easy to find purchasers for all the 200 patents proposed, these conditions were not strictly adhered to, which, as being limitations of the prerogative, did not bind the successor. The first baronet, created in 1611, was Sir Nicholas Bacon and then this dignity was, under James I., conferred upon 200 persons, under Charles I. upon 253, under Charles II. upon 426, and under James II. upon 20. The total number of creations down to the present day amounts to

more than 1700, of whom about 750 are still in existence, to whom must be added a small number of Scotch and Irish baronets, whose special creation ceased with the Union. The richest old knightly families passed for the most part into the peerage and into this baronetcy; yet there are also still a great number of old freeholding families, who only indicate their descent by their coat of arms.

(2) The enfranchised middle classes have in the course of the seventeenth century attained to political consciousness and to an influential significance, which they did not enjoy either in the preceding or in the subsequent period. The statistics as to the numbers and prosperity of the yeomanry at the time of the civil wars are confirmed by their money payments in the civil wars, and by the great influence of the middle classes at elections. The house of the English yeoman was rough enough, and down to Elizabeth's time had not even a chimney; but the good food

On the other hand, the division in the boroughs was very doubtful. In these the restriction of an active participation in their government reacted continuously upon the suffrage, so that in the majority of cases only the select bodies, capital burgesses, etc., took part in the elections, and the old rule that the right to vote resided in all those who paid scot and bore lot, became actually the exception. Indifference, a result of being no longer accustomed to personal service, want of all statistics for examining into the state of things, and tacitly, also, a feeling that such a restriction was neither illegal nor inequitable, all worked together here. "Incorporation" had become the legal form for this exclusion, which was, on being granted, either expressly restricted to a narrow circle, or was understood to have been so granted. This conception so predominated in the practice of the courts, in jurisprudence and in the election decisions of the Lower House since James I., that we must perceive in it not merely a chain of abuses, but a tacit equalization of the anomalously large representation by an equally anomalous restriction of the enfranchised classes. Even James the Second's brutal treatment of the municipal constitutions cannot in this respect be particularly blamed. At the eleventh hour James issued, on the 17th of October, 1688, an ordinance for reinstating the corporations, annulling the act of disfranchisement and renewing the ancient charters. The majority of the towns took advantage of it, yet only returned to a sort of degenerate

and the comfortable appearance of the middle and lower classes has been frequently and credibly testified to. Henry the Eighth's merits have been recently perhaps too highly estimated in Froude's enthusiastic description, and the guild and labour protection system somewhat idealized. But the raising of the economic independence of the middle classes within the agricultural regulations then existing has scarcely been over-estimated. Certain social political laws also of Elizabeth's disclose a direct intention to advance the maintenance of a land-owning middle class by parcelling of estates. In the following period I shall again refer to entails, which were of a contrary tendency. A change was moreover introduced in the social customs of this time, which more and more prevented the means of the aristocracy from being spent in hospitality to their neighbours, followers, and servants, diverted their expenditure into other channels, and thus diminished the immediate influence of

the great landowners as well as of the higher clergy upon the middle classes. The old oath of fealty to a meane lord became under these conditions of things a pure formality. The classes which formerly in great numbers belonged to the great manorial households as idle servants, now found as tenants, tradesmen, and mechanics a more burdensome, though a more independent existence. The novelty of their position and the want of a fixed limit to the middle classes is moreover seen in the deficiency of all proper designations of class and rank. The name *yeoman* for the country freeholder almost takes the place of the *probus et legalis homo* of the Middle Ages. The designation *mystery, magisterium*, and the word "mister" (master) derived from it, were widely employed as names for the respectable tradesman and commercial man even in legal documents (Ooke, "Inst." ii. p. 668). In the tables of precedence the whole middle class is taken together under the name of yeomen.

existence, in which no serious reform was thought of. After the parliamentary suffrage in the boroughs had become interwoven with the influence of a ruling class and its various parties, a reform proceeding from Parliament could no longer be expected. Like the castles of the Middle Ages, the boroughs now became fortified strongholds for the political influence of the Whig and Tory nobility, and for a smaller part of a municipal patrician clique. The Convention Parliament expressly confirmed all the abuses of the select bodies; the most zealous Whigs soon showed themselves the most zealous representatives of the deformities in the right of corporations, and no sincere attempt to restore a regular municipal franchise was again made for a century to come. As a final result the gentry secured by this means a paramount influence, as was in truth due to them of right for their exertions in the county and parochial unions. In spite of glaring anomalies in individual cases, there was on the whole in the distribution of the franchise a *jus æquum*, although a hard problem was left for a future generation, in which that equalization no more existed. (2\*)

The class of electors thus limited is, from an economic point of view, a rising one. The number of freeholders has without doubt increased, owing to the passing of huge monastic properties into private hands, to the divisibility of landed estates, and the freedom of devise since Henry VIII. Still more have the progress of agriculture and the market found for produce in towns that have now become wealthy, increased the revenue even of the smaller freeholders. The later calculation, that there existed in the seventeenth century 160,000 freeholders, with an average income of £60 to £70, is, like all statistics of these times, probably exaggerated; but, making all allowance for great differences in different counties, the existence of a numerous and well-to-do class of free farmers at this time is beyond all question. A prosperous middle class was also to be found in the cities, in consequence of a fairly uniform rise in commerce, navigation, and trade. Excepting some unfavourable times and the decay of certain branches of industry, both wealth and prosperity steadily increased in the seventeenth century in spite of the civil wars. This economic position, allied with the consciousness of political influence, with an energetic activity in the parish, and with the progressive development of ecclesiastical

(2\*) The relations of the municipal constitutions and the municipal franchise to Parliament had at the close of this period become so complicated that for a more detailed description I must

refer the reader to Gneist, "*Geschichte des Self-Government*," pp. 318, 325, and to the survey in Gneist, "*Self-Government*" (3rd edit., 1871), sec. 100.

reform, made the middle classes the depositaries of independent thought and the mainspring of the opposition to the dynastic hierarchy of the Stuarts; for which reason also the Restoration attacked religious dissent and political heterodoxy among the civic middle classes, without essentially checking their material development.

III. *The unfranchised classes in town and country* form, it is true, a personally free class, and one on an equality with the classes socially above them, both in respect of rights of family and property, but one which has no active share in expressing the will of the State. Both socially, and also in respect of their private rights, this class appears to have become to a certain extent raised.

The position of the petty freeholders, who were excluded from the franchise, was involuntarily changed by the rapid depreciation of the coinage and the value of money, especially since Henry VIII. While the shilling had fallen to one-third of its former value, and the money produce of land had steadily risen, a number of small freeholders were constantly rising into the class entitled to exercise the franchise.

The copyholders, from being tenant-farmers, have now become partly hereditary possessors, and in part are at least now protected against arbitrary dispossession. Villein tenure only now continues in the form of actual burdens and dues payable on change of possession. The consent of the lord to alienations and the fees payable on change of tenant served the practical end of preserving this kind of real tenure in a more fixed and intact state than freehold. The more persons of higher degree were anxious to acquire such estates, the more did the idea of villeinage become lost in the idea of an inferior tenure.

The status of the propertyless working men was also raised by the growing prosperity, and by the protection of guilds, which the Tudor legislation allowed as an equivalent for its police measures regulating trade and labour.

The legislation of the Tudors also made fatherly provision for the poor working classes, by fixing the prices of provision and wages. Credible statements inform us that a daily pay of 3½d. was, when compared with the price of provisions, relatively high. (3) The Restoration, too, only exercised a pressure

(3) The unenfranchised, properly speaking, the third estate, was in legal and popular language never so termed, because the styles of estates and ranks were regularly taken from former epochs. But as a fact it has this third position as being formed of a number of *liberi homines* in the old sense, all being

equally entitled with regard to private rights. The disappearance of the remains of serfdom in Elizabeth's day is testified to by Sir Thomas Smith de Rep., iii. c. 10. An occasional mention of serfs in judicial decisions under James I. is an antiquarian curiosity. Considering the general conditions of paid labour,

upon political views, and not upon the social position of the lower classes, particularly in towns. There is especially no tendency apparent to extend the labour-police.

English society, regarded as a whole, forms at the close of this period a pyramid with gradually descending relations of protection and dependence; at the head the peerage, as the apex of a landed gentry on a broad foundation, firmly rooted in the county; this latter again as leader of a still wider class of patrician families; the whole ruling class again with an ascendant influence upon the enfranchised middle classes; the whole population held together upon the basis of equal family and property rights, in which even the institution of entails is quite as accessible for the farmer as for the greatest peer in the realm. That the whole system was conceived of as being a just distribution of civil rights and civil duties is shown by the course of the revolution, in which the most passionate pretension of the rights of the person and the realization of the republican ideal led, not to a lowering but, to a raising of the electoral qualification. The social bases of this political system were so firmly established, that the violent proceedings of Charles I. and James II., the violent deeds of Cromwell and the Puritans, two royalist, one republican, and one aristocratic revolution passed by and left the constitution externally unscathed.

the ruling classes had neither any interest in keeping up nor yet any inclination to retain, that isolated fragment of Middle-Age barbarism. As to the conditions of the copyholders, and as to privileged villeinage and pure villeinage, cf. Blackstone, ii. 92 *seq.* The real burdens of copyhold which were akin to the feudal burdens were not abolished by 12 Charles II. c. 24, be-

cause they were regarded as private *jura quæsitæ*. Accordingly the incident fines payable on alienation, taking up the inheritance, the heriots, etc., to the lord of the manor still remains. As to the legislation of the period affecting trade, cf. above, p. 468. How this class was politically regarded in Elizabeth's time, is shown by the testimony of Harrison (1568).

## SIXTH PERIOD.

*THE PARLIAMENTARY GOVERNMENT OF  
THE EIGHTEENTH CENTURY.*

## CHAPTER XLIV.

*The Structure of the English State after the Revolution.\**

WILLIAM AND MARY, 1689-1695  
WILLIAM III., 1695-1702  
ANNE, 1702-1714

GEORGE I., 1714-1727  
GEORGE II., 1727-1760  
GEORGE III., 1760-1820

WITH the Reformation, the Revolution, the Restoration, and the expulsion of the Stuarts, the limits of the executive power were in England defined, and the political constitution was formally established. An external change was brought about by the union with Scotland (1706), and with Ireland (1801). Apart from this, the accession of William III., with the Declaration of Rights, marks the commencement of parliamen-

\* The authorities of this epoch, which in their voluminousness belong partly to political history, and partly to jurisprudence, allow only a slight selection to be made with reference to the following points:—The statutes of this period form an almost boundless mass of matter, for which the official collection of Statutes of the Realm ends with the death of Anne. The current collections of statutes, however, contain the text complete and correct in all material points. For the Proceedings in Parliament, the "Parliamentary History," vols. v.-xxxvi., extends from the year 1668 to the 12th of August, 1803, with which date this collection stops, and is continued in a new series as (Hansard's) parliamentary debates.

A work upon the history of English Law for this period is wanting. About the middle of the period the first edition (1765) of Blackstone's famous work,

"Commentaries on the Laws of England," was published, which down to the close of the century passed through eleven editions. It contains in vol. i. (rights of persons) an admirably written survey of public laws, clearly emphasizing the chief points, which has not been excelled by its later commentators (Stephen, Bowyer, Warren, Kerr, etc.). On the other hand, the historical introductions are merely short sketches. For an exclusive survey of the rich political literature, I may refer my readers to R. von Mohl, "Literatur des Staatswissenschaft," vol. ii. 1856, pp. 3-236.

For local government there appeared in this period a standard work, Burn's "Justice of the Peace" (1st edit., 1755, two small vols., then increasing to four vols. down to the 19th edit., 1800, and now in the 30th edit. in five very compendious vols.—containing more than eight thousand pages).

Of general and political histories the

tary government by party, the consideration of which requires a comprehensive survey of the structural fabric of this political system in the eighteenth century.

Like all great free states, the British is based upon a strong and firm construction of the executive. In so far as it is necessary to make the person and the property of the individual serviceable to the State, this State is stronger than the most absolute despot in Europe. Since the Norman days, a feature of military obedience and discipline pervades the English political system, a system which, hitherto unknown to the States of the Continent, has only been efficiently portrayed to them by modern historians.

The *Crown* is at all times the source, the *courts of justice* the barrier, and the *law* the supreme regulator, of these powers. But, throughout the four hundred years of legislation since Edward I., a relation of mutuality has entered into these elements, which circumscribes State and society, State and Church, local government and estates alike with fixed legal barriers. These self-imposed bounds of the Crown work at the same time as legal limitations of Parliament and parties, and as a legal protection of classes, corporations, and individuals. The sanctity and inviolability of this system was acknowledged by a formal agreement between the two great parties of the nation, on James the Second's abdication; and all party formations, all party movements since that time have been based upon the following conditions.

1. The law recognizes the hereditary Crown as the fundamental institution of the land, and establishes its fixed succession by the Act of Settlement.

2. The law controls the sovereign rights of the State, imposes the requisite duties upon the subjects, and specializes these duties in a manner which prevents arbitrary proceedings against individuals.

3. The law regulates the exercise of magisterial rights by counties, towns, parishes, and corporations, which thus become

following must be specially mentioned: Hallam, "The Constitutional History of England," vol. iii. (down to the death of George II.); Lord Mahon, "History from the Peace of Utrecht," etc., 1836-1854, six vols. (from a Tory point of view); W. Massey, "History of England under George III., vols. i. and ii. 1855 seq.; Thomas Erskine May, "Constitutional History since the accession of George III.," vol. i., 1861 (German translation by Oppenheim); Charles Duke Yonge, "The Constitutional History from 1760 to 1860," London, 1882.

The very rich matter is in many cases almost too intimately connected with the family and party relations of the present times.

For the statistical and administrative conditions of the eighteenth century, John Adolphus, "The Political State of the British Empire" (London, 1818, seq. 4 vols. 8vo), contains much valuable matter; to which much may be added from the writings of McCulloch and other politico-economic works, especially on the history of the poor law system.



the fixed depositaries of political functions, according to the peculiar system of English self-government.

4. The law affords for the maintenance of these administrative functions a legal protection, by a comprehensive system of remedies *ex debito justitiæ*, the now so-called *administrative jurisdiction*.

5. The law determines also, with the duties of the subjects, the corresponding *rights of the estates*, among which a "ruling class," with an influential share in the executive, makes itself prominent.

6. and 7. The law governs their combination as a representation of the *communitates* in the Lower House, as a spiritual and temporal peerage in the Upper House, each with a suitable share in the exercise of the political powers among themselves and towards the Crown.

8. The law guarantees to the Established Church the self-government necessary for ecclesiastical activity, and thus succeeds in finally reconciling Church and State.

9. Upon these foundations a new relation is formed between the "King in council" and the Parliament, which has become known under the name of Parliamentary Government.

Within this framework \*\* the parties of the English political system are formed, as well as the practice of parliamentary government and the transition to the reorganization of society in the nineteenth century (Chapters liv.-lviii.).

\*\* There is perhaps no more fruitful and instructive parallel than the comparison of this structure in the

eighteenth century with that existing at the close of the fifteenth century (Chapter xxix.).

## CHAPTER XLV.

I. *The Restoration of the Hereditary Monarchy.*

JAMES THE SECOND'S deposition threatened to produce a series of struggles and revolutions, such as from the Norman times downward had always attended every breach of the legitimate succession. Only too vividly did the consequences of the execution of Charles I., which had happened only a generation previously, stand before the eyes of the men of those times. To avoid similar consequences, both parties, after long scruples and deliberations, framed the resolution "that King James II., having endeavoured to subvert the constitution of this kingdom, by breaking the original contract between King and people, and by the advice of Jesuits and other wicked persons having violated the fundamental laws, and having withdrawn himself out of the kingdom, has abdicated the government, and that the throne is thereby vacant."

The fact of deposition was veiled by the fiction of a resignation, which in some measure was in accordance with the circumstances under which the King had quitted the country, and by the further fiction that the heir already born, Prince Edward, was illegitimate, an assertion which coincided with a widespread popular opinion, as well as by the addition of further circumstances of the event, which, according to human calculation, could not recur in the same form, so that the danger of forming a precedent was avoided.

In consequence of these fictions, the Crown was held to devolve upon James the Second's eldest daughter, as heiress, who was now recognized, in conjunction with her husband, as the rightful heir to the throne. Quite as consistent was the devolution of the Crown to her younger sister Anne, failing issue of the union of William and Mary, a contingency that was not anticipated in the year 1688, but which actually happened.\*

\* The declaration of the 12th of February, 1688, determines the succession thus: first William and Mary jointly; then the survivor of them; then the issue of Queen Mary; then,

failing such issue, the Princess Anne and her issue; failing these, William's issue, as the grandson of Charles I., and nephew and son-in-law of James II.

This was *ex necessitate rei* the closest practical adherence to the traditional descent of the Crown, due regard being paid to the fact that, in consequence of the great shock sustained by the realm, a male ruler appeared indispensable, and that therefore William should be joint sovereign together with his consort, of whom he should even take precedence.

A still further limitation of the succession appeared necessary, according to the experiences of the past. The succession of the Catholic Mary I. had plunged the country into a bloody counter-revolution, the succession of the Catholic James II. had brought about a fresh revolution. The nation was not to be exposed for the third time to the disastrous vicissitudes of a Catholic succession. Accordingly the stat. 1 William and Mary, c. 2, was passed, to the effect that every person, "confessing the popish religion," or who should contract a marriage with a popish consort, should be for ever incapable of succeeding, that the people in such case should be freed from all allegiance, and that the Crown should pass to the next Protestant heir.

When, towards the end of William the Third's reign, a failure of male issue became probable, alike in his case and in that of the Princess Anne, the final Act of Settlement (12 & 13 Will. III. c. 2) was passed, which in case of the failure of Protestant descendants of Charles I., goes back to the electress Sophia of Hanover, the daughter of Princess Elizabeth, who was the daughter of James I., whose agnate Protestant descendants were to succeed to the throne in the event of the deaths of William and Anne.\*\*

The legal and moral verdict of posterity has with rare accord acknowledged the "glorious revolution" as justifiable. It was no breach of divine and human law when, after the experiences of three generations, the nation emancipated itself from the male line of a dynasty, which had utterly misunderstood and neglected every duty of the Crown and every task imposed by the times. Former centuries had ended the life of more than one English king in a manner that was more akin to a breach of right than was the treatment experienced by this King. If the English nation had

\*\* Legal construction was obliged to resort, for these deviations from the legitimate succession in the male line in favour of daughters, to legal fictions and to a deduction *ex necessitate rei*, to reduce the breach that had been made in the fixed rules of hereditary descent to its lowest possible importance, and to avoid dangerous precedents for the future, so far as human prudence and wisdom could effect this. Blackstone

builds up from this proceeding his four positions concerning the royal title: (1) that the Crown is hereditary, (2) hereditary in its own manner (analogous to the descent in real estate), (3) that the right of succession may be from time to time altered or limited by resolution of Parliament; with which restrictions (4) the Crown always will be hereditary, is so and remains so.

for three whole generations borne the misgovernment of such a dynasty, if it at the last veiled over the most frivolous tyranny of James II. with the good-natured fiction of an abdication, the reason for this moderation lay in the mature experience of a people that had arrived at man's estate. It was not the inexperience of a people that has been long unaccustomed to all spontaneous action in public life, such as characterizes the French revolution and its successors, but it was the consciousness of the great shock to all legal and moral foundations, which follows the overthrow of a legitimate monarchy, it was the probability of the consequent swamping of the State by the egoism and the party-system of society, which made the nation endure so much with patience. For the first time, with the clear consciousness of the consequences that would attend a change of dynasty, the English people took the manly resolve to accept the consequences in spite of all.

In truth, the conditions of things that ensued after the change of dynasty, resembled the times immediately following Magna Charta. Discontent had never been greater than it now was, when everything appeared won. A factious nobility, with complicated plans of action without any great aims, and capricious changes in the prevailing opinions, fill the whole of the next generation. The Whigs, whose chief strength lay in their majority among the nobility and in the upper classes in the cities, did not cease, in spite of all legal fictions, to regard the King as their own creation; the Tories persisted in considering him only as a sort of regent. The working classes in sullen apathy witnessed the departure of their natural protector, the legitimate monarch; and they received their new lord with the same indifference. Parliament, church, and common law returned to their old places; yet the victorious party regarded this as a natural consequence. No one felt himself socially in a better position; but the Tory party found to its vexation, that only their hated opponents, and with them a foreign prince, had attained to power. This new monarchy, even though an act of political necessity and wisdom, was and remained an artificial thing. The hearts of the people were not with the King, and therefore, perhaps, the King had no hearty feeling for England. William's chief object in life, the struggle against the ascendancy of France, and the maintenance of the independence of Holland, and of the balance of power in Europe, was not in accordance with insular views. The grand struggles of the statesman neither gained for him the approval of the great parties, nor endeared him to the multitude. Parliament had certainly gained all that could be gained in this constitution; the monarchy was

now "an expensive but otherwise inoffensive capital to the social column." The result, however, was not an exalted feeling of civil liberty, but constant collisions of the Government with a proud and hot-blooded nobility, a purse-proud middle class, and an intriguing divided clergy.\*\*\*

The lesson taught by the glorious revolution, a lesson never to be forgotten by the English people was, that even the most righteous insurrection of society against the constitutional executive is the greatest disaster that can befall a nation. After this glorious revolution, there remained innumerable difficulties to contend with, throughout the whole system in the internal life of the nation which a just, wise, and conscientious monarch would have spared the English people. Even in the second generation there is disclosed to us in the new order of things an open attempt at rebellion. It was not until the third generation that the evil effects of the change of dynasty were really healed.

\*\*\* The riddle of the phenomena which occur after every great rising of a nation (as also after the reformation in Germany) can never be otherwise explained than from the nature of society itself: "After the display of the noblest energies, and after the highest ideal aims have been realized, there comes a weariness, and with it an unfettering of social interests, which by 'Freedom' only understand the immoderate satisfaction of their own interests. After the most glorious result has been gained for the whole community, the individual proceeds to

strike the balance for his little world—his *ego*—and begins to calculate how much of the glory and fortune of the great whole belong to this *ego*. Vexed at the small balance in his favour, and even finding a deficit in the account of his prosperity, he gives way to the nature of his social character, pays the tribute due to the imperfection of human nature by an attitude which degrades the great relations to the lowest standard, after their exaltation to the highest and holiest" (Gneist, "Preuss. Finanzreform," 1881, p. 247).

## CHAPTER XLVL

II. *The Regulation of Sovereign Rights by Law.*

In the course of the Middle Ages the Germanic nations display a national tendency to regulate, hand in hand with the hereditary monarchy, the exercise of the royal sovereign rights to the widest extent by fixed principles, which, acting on both sides, bind both King and people. At the close of the Middle Ages, this specialization had made such progress on the Continent, that the development of an administrative legislation may be regarded as the main point of contrast between the modern political system and the Middle Ages, as well as the ancient world. In England, the long struggle against the absolutism of the Norman Crown and the century of Stuart misgovernment brought the specialization of these rules of law to an extreme form, which reached its height in the eighteenth century. This regulation by law embraces all departments of internal political life to the utmost possible limits.

I. *The regulation of the military power of the State by law* is based upon a separation of the armed force into the ordinary military system of the militia, and the extraordinary organization of a standing army.

The militia laws of the eighteenth century are bound up with the system of the Restoration for the acknowledged purpose of keeping the wealthy classes at the head of the armed forces. These statutes repeat in monotonous detail, and, as a rule, literally, the clauses of their predecessors. After evil experiences as to the small utility of the militia forces, the stat. 30 George II. restricts the number to 80,740. However, in 2 George III. an extension and a reframing was made, and, after many additional provisions, a new consolidation was effected in 26 George III. c. 107, in which form the militia continued down to 1802. In the later statutes, the strength was fixed at 120,000 men, and in like manner the number of supplementary militia was limited. This legislation, however, of course not only determined the personal service of the soldiers, the manner of drawing them, and the grounds of exemption from service, but even the composition of the

regiments, battalions, and companies, the organization of the staff and the times of training. But this statute principally regulates the composition of the administrative commissions and the qualification of the officers. By 2 George III. c. 1, and 26 George III. c. 107, the lord-lieutenant appoints in each county twenty or more deputy-lieutenants with a qualification of £200 income from freehold, in the smallest counties £150. He appoints the colonels with a qualification of £1000 income, or double that sum in expectancy. The qualifying income of the lieutenant-colonel is £600; that of a major or captain, £200 (or heir to £400, or younger son of a landowner of £600). A lieutenant must have £50 income and £1000 personalty (or both together £2000, or the son of a deceased landowner of £600). An ensign £20, or personalty valued at £500, etc. There is no stronger contrast to this form of land army than the Prussian *canton-system* of the same period, which casts the whole of the personal service upon the peasant classes and lower classes in the towns, and raises funds for the army expenses by contributions from peasant farmers and the excise of the cities. (1)

In equally strong contrast to the needs and legal relations existing in Continental States is the conception of a standing army in England. The rough military rule of Cromwell, as well as the attempts at overthrowing the constitution made by James II., had left behind them the lasting

(1) The very dubious utility of an army organized according to this system was seen on the occasion of the invasion of the Pretender in 1745. Such experiences and the constant mistrust of a standing army led from time to time to improvements and strengthening of the forces. But after the scare had passed away the old carelessness returned. With the exception of the city militia of London, in the middle of the century reviews and trainings were again neglected, until, in the year 1756, the danger of an invasion led to the resolution to form a less numerous, but more efficient militia. But soon the number was again considerably increased, to 120,000 men. The militia thus organized was and remained unsatisfactory for immediate employment in the field; but it was still so considerable in numbers, and the standing army, compared with it, so small, that materially as well as morally it was thought that the elements were almost evenly balanced. The militia actually again revived in the period of the French

wars. In 1793 and 1796 a supplementary militia was introduced to increase the forces. But the inclinations of the upper classes were directed rather towards forming volunteer corps. The first statute on this subject is 34 George III. c. 81. Four years later the stat. 38 George III. c. 51, was passed for the formation of mounted volunteers (yeomanry cavalry). All supplementary militia and volunteer corps still keep up the connection between the armed forces and landed property; the commissions of all the officers are conferred by the lord-lieutenant. In the time of the threatened invasions from France considerable contingents of volunteers were even furnished and equipped by rich landowners at their own expense. The supplementary militia organized in accordance with the statute of 1796 was actually mobilized in the spring of 1798, but those troops served very soon as material for drafting into the standing army, which was with certain restrictions allowed and voted by Parliament.

impression, that every standing army was a source of danger to the constitution and in irreconcilable opposition to the rights of the estates. Yet, as such an army appeared indispensable, considering the colonial possessions and the international position of England, a paid army was after 1688 tolerated under the following conditions:—

1. Under an acknowledgment to be annually repeated, that the existence of a standing army in times of peace is contrary to law.

2. Under the acknowledgment to be also reiterated every year, that this army is not necessary for the maintenance of political order, but only convenient for "upholding the balance of power in Europe."

3. Under the condition that the expenses of this army are to be entirely defrayed by an annual subsidy, and thus dependent upon a free grant of money voted by the Lower House and liable to be refused.

4. Under the condition that the command and disciplinary powers of the Crown necessary for a standing army are as extraordinary powers to be granted each year by Parliament by a Mutiny Act (beginning with 2 William and Mary, c. 5, sess. 2, c. 14), on the refusal to grant which the army would be *ipso facto* disbanded.

5. Finally, with a condition that was still further developed in the course of the century, that by the system of purchase of the officers' commissions, the whole corps of officers, both of the infantry and cavalry, remains reserved to the sons of the dominant classes.

Under these very anomalous conditions the effective strength of the army in England is dependent upon the resolutions of Parliament, which annually determines how many paid soldiers shall be recruited and kept on foot.

The principal object of this military system, the maintenance of the national independence against foreign attack, is fulfilled for this island power by the navy, which, in strength and activity, in the eighteenth century finally takes the position which the peculiarity of the country demands. In this normal organization of national defence the normal principles of a military system are to some extent again met with, *e.g.* the fixing of the permanent organic institutions by statute (beginning with 2 William and Mary, c. 8); the regulating of technical details by ordinances, royal warrants, and regulations. (1<sup>a</sup>)

(1<sup>a</sup>) The English military system, compared with the entirely opposite institutions of the Continent, is based upon three anomalies, which in some

measure neutralize each other. (1) The English system of the annually varying strength, the Mutiny Bill, the paid soldiery, and purchase of officers' com-



II. *The regulation of the judicial power by law* is based upon the fundamental distinction between the *administrative side* of justice (the holding of a court) and the *judicial side*—to use a Roman expression, a distinction between *imperium* and *jurisdictio*.

Only the administrative side belongs to the province of administrative law, and is in England fixed by a few organic arrangements, beside which the Lord Chancellor, the Home Secretary, and the common law courts issue rules and exercise a regulating power, of which considerable use has been made in the nineteenth century.

All that, on the other hand, belongs to jurisdiction, in the proper sense (the principles of private and criminal law, the formation of the courts, and the procedure regulating the rights of the parties) is founded partly still upon custom and the practice of the courts (common law), supplemented by the numerous statutes since Edward I., which, like the common law itself, can only be altered by statute. The judicial system appears also in this epoch to be the most stable part of the constitution. In the higher courts, since William III., the appointment of judges for life is again restored, and is legally sanctioned by the Act of Settlement. The jury system is strengthened by the legal control of the lists of jurors which are now made out by the local officers (7 William III. c. 32; 3 George II. c. 25). The qualification of jurors was by 4 and 5 William and Mary fixed at £10 from freehold or copyhold; by a later statute an annual income of £20 from lands held on a life lease is put on an equality with this qualification. The principle that the courts have only to decide according to law, and that they have of themselves to interpret the rules of law, is common to England and to Germany. (2)

missions is applicable to a country which needs its troops for service in distant colonies, and is only inclined at long periods to engage in active warfare within the European family of nations. (2) The militia, which in this form would in any other country be utterly insignificant, still retains in its corps of officers military elements, as the colonies and East Indian possessions afforded the gentry a field for practical military service, in which even great military capacities could be developed. While the state of the country would otherwise easily lead to effeminacy, there was preserved here in the dominant class a military skill, which was also advanced by purchase in the army. (3) The normal conditions of

the existence of a system of national defence, which no nation can dispense with entirely, are again found in the navy, even united with a very harsh system of pressed service. That it has been thought possible to apply the system of Mutiny Bills to continental States, and that it has been considered to be a pattern "constitutional" institution, belongs certainly to the most absurd imitations of foreign institutions.

(2) As to the details of the legal organization of the judicial system, cf. Gneist, "English Verwaltungsgerecht," ii. c. 6. As to the further extension of the right of issuing rules in the province of the administration of justice, cf. Gneist, "Verwaltungsjustiz," sec. 6.

III. *The control of the police power by law* led even in the Tudor and Stuart eras to an innumerable series of special police laws affecting security of life and property, trade, morals, luxury, the poor, labour, highways, etc., which in their outward form are very similar to the German imperial and country police regulations. But this broad system becomes more and more extended, as every amendment has to be brought about by parliamentary statutes. Yet this legislation does not suffice, but needs rather to be supplemented in numerous points by reference to the old police functions of the magistrates, the coroners, the constables, and other officers of the peace according to common law, which all were fixed and determined by the practice of the administration. The tendency to restrict as much as possible in this department the discretionary powers of the officials, could only be worked out in part, and even in the most special police laws the introduction of discretionary empowering clauses was unavoidable. The "general clauses" which are indispensable to the German police administration are reproduced in England for the most part in the "powers of the officers of the peace according to common law." Special local police needs are provided for by local acts, and to a limited extent also by by-laws of the county and local boards. In London and in numerous provincial towns, for example, the urgent demands for a police for fires, building, paving, street-cleaning, watering, lighting, watchmen, and embellishing are met by comprehensive local statutes and by-laws.

The influence of the class interests of the ruling gentry upon the police legislation is characteristic of this period. This is more especially shown in the legislation affecting game, which, in most immoderate exaggeration, goes even so far as to inflict death for the most serious poaching offences. And secondly in the poor law legislation, which, in order to alleviate the burden of providing for the poor, which fell upon landed proprietors ever since Charles the Second's day, allowed a division of parishes into small townships and hamlets. The narrow-minded treatment of the right of settlement and the system of removal, which begins with 13 and 14 Charles II. c. 12, and is continued under James II., is declared to be permanent by 12 Anne, c. 18. The further series of statutes is also pre-eminently occupied with the difficulties of an ever narrower and stricter right of settlement. In a similar spirit by 3 and 4 William and Mary, c. 12, the right of appointing overseers of highways was vested in the magistrates instead of election in the parish union. Moreover, the codified highway regulations of 13 George III. c. 78, retain a mixed system of enforced

labour in connection with the highways and of highway rates. Other characteristics of this period are the endeavours to regulate more exactly the judicial functions and procedure of the justices of the peace, to make the decisions of the magistrates in courts of first and second instance as a rule final, and to secure the obedience of the constables and other executive officers by the express threat of disciplinary penalties; by all which the range of the police laws is more and more increased. (8)

IV. *The regulation of the financial power* by law is based still upon the distinction between the King's ordinary and extraordinary revenue (Blackstone, i. c. 8).

The *ordinary revenue* includes the old hereditary income of the King, the original property of the State, which belongs to the King independently of any vote of Parliament. This original property has very considerably decreased in consequence of the great alienations of the demesnes, the abolition of feudal incidents, etc., and now displays merely a shadow of past greatness. Yet if it had been only properly managed it could have sufficed for the royal household. But through careless management, the Crown lands were, under George III., so heavily burdened with debt that this monarch preferred to assign to Parliament by agreement (1 George III. c. 1) the administration of the Crown estates, and to receive in exchange a fixed sum from the State revenues (civil list). This arrangement, which was made only for that king's life, has, on the accession of all his successors, been renewed, though under different conditions, but always only as an arrangement *pro tempore*, which reserves to the Crown

(8) The range of police laws increased to such a boundless extent that they can only be surveyed in an exposition of the magisterial office as it now exists (cf. Gneist, "Self-Government," chap. v. pp. 189-517, 3rd edit., 1871, and the sections dealing with the police administration in the towns, sec. 107, the pauper police, sec. 119, the police for public health and building, chap. xi., the highway police, sec. 140). The far-reaching extent of these laws stands also in connection with the administrative jurisdiction. The police jurisdiction required very special rules for deciding each particular case, and on the other hand for the practical use of the magistrates, their clerks, and under officials, it was necessary that the laws, which were to be applied in each single case, should be found in as complete and compact a form as possible. The poor law legislation of this

period is so artificially framed that it can only be understood in a detailed exposition. The codified highway regulations of the year 1773 still retain the system of manual labour (contributions in kind), yet allow low rates to be paid in acquittance of such labour and services, and raise the expenses by a highway rate. (There is extant a calculation of the year 1814, according to which the value of service in kind is computed at £551,241, the moneys paid in lieu thereof at £287,095, and the highway rate at £621,504.) The necessity for constructing roads, which had begun to make itself felt, was regulated by local acts, by which committees are formed for this purpose, the members being magistrates and interested persons. A general supplementary act for regulating highways was issued in 13 George III. c. 84.

at every change of Government the option of taking back the hereditary revenue into its own keeping and management. (May, "Const. History," c. 4.)

By the *extraordinary revenue* is understood the income derived from direct taxation, customs, and excises granted by vote of Parliament. The great and constant needs of the State in the eighteenth century, and the rise of a national debt, no longer allowed the machinery of the English State to be dependent upon periodical votes of subsidies, which the Lower House also no longer needed for the sake of influence. In the course of the eighteenth century, accordingly, all the subsidies that were till then temporary passed into permanent taxes; the taxes and custom dues to be raised after that time were no longer "voted," but were raised for the State coffers by operation of law. It was only on the introduction of the modern income tax and the legal regulation of the new customs tariff, that a movable form was again provided for a moderate portion of the direct taxes and certain articles included in the customs tariff, so that perhaps from one-tenth to one-seventh of the revenue is dependent upon the vote of Parliament. With the regulation of the customs and taxes by law, the most precise specialization entered also into the financial statutes, which determined the subject, object, mode, and measure of the tax to the very confines of possibility. The influence of the ruling class here shows itself in refusing each and every new assessment, and consequently in the decay of the old land tax, on the other side in an immoderate increase in the excise and customs, the last named in the protective interests of great manufacturers and landowners. (4)

Strict regulation by law is also applied to the system of local rating, in which, by many hundred statutes and by the

(4) Customs became permanent taxes by 9 Anne c. 6, 1 George I. c. 12, and 3 George I. c. 7; with 27 George III. c. 13, the systematic customs tariff began. The old subsidies, tithes, and fifteenths were by 4 William and Mary, c. 1, made fixed taxes, in the case of which the contributions arising from personalty were almost entirely waived and the now so-called land tax was levied upon the counties and towns, by 38 George III. c. 60, changed into a permanent tax upon landed property. Into the place of the periodical subsidies came, after 1797, a legally fixed property and income tax, but with a varying scale. A house and window tax was introduced by 7 William III. c. 18, as a permanent tax. In like manner the *assessed taxes* (that is, a group of taxes levied upon

provisions, articles of luxury, and trade) were introduced as the financial needs increased, and codified in 48 George III. c. 55. In like manner the special stamp duties (cf. Vocke, "Gesch. der Steuern des brit. Reichs." Leipzig, 1866). The alleged "constitutional" principle that the Parliaments had annually to vote all the revenue to the Government has in Germany arisen less from the English pattern than from a confusion of the old periodical subsidies voted by the Landstände with the modern system of taxes regulated by law, which latter is alone admissible and practicable for our modern State organization. The constant mistaking of votes of subsidies for taxes created by statute is an inexhaustible source of confusion.

practice of the courts, subject, object, and method have been exactly laid down, and the local authorities are allowed no autonomy in fixing the rate of taxation, but may merely make a calculation of the annual need and co-operate in assessing the rates and taxes.

V. Lastly, *the ecclesiastical power and supremacy* was limited and controlled by the Acts of Supremacy and Uniformity of Elizabeth, and the supplementary statutes of the Restoration, directed towards upholding the power of the State against possible encroachments of the ecclesiastical authorities, by the statutes of *præmunire*, Mortmain, and other similar statutes. The Act of union with Scotland added a guarantee of the permanence of the constitution of the Anglican Church. (5)

In spite of the enormous extension of this legislation, the original rival relations subsisting between law and ordinance in administrative law remained fixed and established. The activity of a State can, in spite of all endeavours, never become exhausted in statutes. Society rather, in its varying phases according to time and place, requires an ever fresh activity in ordering or prohibiting on the part of the State. And what the executive has to order in individual cases, it can also, in cases of a similar kind, command or forbid by ordinance. The requirements of civil life remain accordingly an inexhaustible fount of new rights of ordinance. In consequence of the misgovernment of the Stuarts, however, we find in every case where the executive power addresses itself immediately to the person or property of the subjects of the State, the English legislation so extremely specialized, and the department of internal administration so extensively preoccupied and overgrown by legislation, that the field for an independent right of ordaining appears exceedingly limited, so that English jurisprudence made the error of holding that the right of ordinance only existed for the purpose of "executing the law." And thus the blessings of legal regulation and control became a galling fetter, which gave the English administration an unwieldy character, that could only be gradually removed by a more intimate bond of union between ministry and Parliament (Chap. liii.).\*

(5) Cf. Gneist, "Englische Verw. Recht," ii. c. 8, and below, Chap. xlvii.

\* That the relation between law and ordinance, as it was established at the close of the Middle Ages (above, p. 374), remained also unchanged in England, has been proved in Gneist, "Verwaltung, Justiz, Rechtsweg" (1869), chap. vi. p. 69 *seq.* Only the administration of justice by the civil and criminal

tribunals is exclusively dependent upon the rules laid down by the legislature, whilst in the department of administration, ordinance remains binding for State officials and subjects so far as its province has not been already occupied by a positive administrative law. But this was in England the case to such a wide extent, that the right of ordinance, appears even in Blackstone only as a supplementary function. With re-

## CHAPTER XLVII.

## III. The Connection of Sovereign Rights with Local Institutions—The System of Self-government.

As the exercise of sovereign rights must take place according to geographical districts, the State needs executive organs in the greater and smaller unions of the counties, hundreds, towns, parishes, and villages. Since the Anglo-Norman times these functions have in England been taken more and more from the *vicecomites* and bailiffs, to be discharged as far as was possible by the parishes, and, in their further development, principally by individual officers chosen from the resident staff of the communities. The English unions of parishes are, however, not privileged to regulate their own police system, poor-law boards, and rates according to their own will, but they exercise legally limited authoritative rights in their capacity as indirect State officials; and raise and extend their rates according to a legally determined scale, for legally determined objects. English self-government has accordingly formed itself into a system of offices and rates, regulated and determined by law.

If for this system (which even in England has never been legally defined) is used the expression *self-government*, there will still be needed a distinction between *magisterial self-government*, which is pre-eminently meant by the term *self-government*, and *economic self-government*, which has its centre in the system of local taxation and the assessment and employment of that taxation within the respective unions.

I. *Magisterial self-government* is bound up with the high offices, which arose as early as the Middle Ages, the competence of which is regulated partly by common law and partly

by statute. In the forms, the English ordinances are almost identical with our own. The ordinance appears either in the solemn form of a royal resolution, countersigned by the whole ministry (order in council), or as a cabinet order with the counter-signature of the head of a department (warrant), or as a delegated right of ordinance, most fre-

quently of a secretary of State. In like manner the division into independent ordinances, executive ordinances, and the ordinances reserved by law is in England identical with ours in Germany. The department of district and local police ordinances, on the other hand, is much more restricted than in Germany.

by statute. The English central government had, until quite recent times, no other organs for provincial, district, and local government than these offices within the several communities. For this reason they all have this characteristic, that being free from every element of manorial jurisdiction or manorial police control, they are regarded as pure official functions, and are subject to the civil and criminal responsibility, the right of control, the right of supervision, the disciplinary control, and the right of dismissal, almost exactly corresponding to the German notion of "*Mittelbare Staatsbeamten*." Of this kind are the following offices:—

1. The ancient office of sheriff, *Viccomes*, which indeed has lost its important ancient functions in the course of centuries, but which still continues as a subordinate judicial office for summonses, executions, and for carrying out the sentence of the law, with the presidency in the still nominally existing "county court," a right of precedence, and many remnants of an old vice-royalty. The office is annually filled by one of the great landowners of the county.\*

2. *The office of the lord-lieutenant*, the modern vice-royalty of the county, is filled by one of the most aristocratic landowners in the county, practically for life, and with powers to appoint the officers of militia and the commissioners of the militia department, who for the most part are also on the staff of magistrates, just as the lord-lieutenant is, as a rule, made first magistrate, *custos rotulorum*.

3. *The office of justice of the peace*, dependent upon the royal commission of peace—the life and soul of the district administration, with almost unlimited functions for examining criminal cases—as police magistrates, as court of higher instance for the parish, as district government board, and as a criminal court with a jury in the quarter sessions.

4. *The office of coroner*, whose principal duties are those of a commissioner of inquiry, wherever unusual deaths have occurred, with a jury from the neighbourhood; anomalously not appointed by the King, but elected by all freeholders in the county.

\* In the main the "civil court" of the sheriff has now become an accessory department of the common law courts for summonses, executions, and summoning the jury. For these current official functions he appoints for the period of his year of office as his deputy an under-sheriff, whose lawyer's office is the central bureau, from which are issued the various orders, carried out by the bailiffs of hundreds, but in whose stead bound bailiffs gene-

rally discharge the greatest part of the detail business. Thus arises a procedure not unlike that of the French *huissiers*. In like manner the sheriff was responsible for the appointment of the officers of the county prison. The office of sheriff signifies accordingly in the main a right of appointing to a number of lower offices, which are thus withdrawn from the ministerial patronage.

The office of constable is subordinated to these magisterial officers of self-government.\*\* As subordinate officers, though in a more independent position, are to be regarded the churchwardens and overseers of the poor and of highways, who, in their principal functions, belong to the department of economic self-government.

This official system is supplemented by a powerful bond of connection with the people, namely:

The immediate activity of the middle classes as a jury in civil and criminal cases at the assizes and at the quarter sessions;

The grand jury in assizes and quarter sessions;

The participation of the whole people in the duties of prosecuting and giving evidence, which liability is enforced by the justices of the peace against the proper persons, by binding over to appear and prosecute.

Finally, to these are added the activity in the assessment commissions for the land tax, which, since the civil wars, have, both in the persons comprising them, and in their procedure, become more and more identified with the office of justice of the peace. The same system is extended to the assessed taxes, as well as to the income tax introduced by Pitt at the close of the century.

The independence of the higher officers of self-government—and thus the independence of the local government itself—results not from the freedom of their decisions, and not from an autonomy such as arose in Germany in former centuries for provincial and district unions, as well as for towns and villages. The independence of self-government is rather entirely founded upon the position of the honorary office held by the officer, which, by the fact of his tenure of it, grants him a judicial independence, and which, in conjunction with the administrative jurisdiction (Chap. xlviii.) developed in the course of the eighteenth century, has had the indirect consequence, that the honorary officer can, as a rule, be only made responsible by judgment and law.

II. Economic self-government is primarily rooted in the economic communion of the small country parishes and in the spiritual needs of the ecclesiastical parish, which latter

\*\* The high constable is immediately subordinated to the body of justices of the peace, as bailiff of the district, principally appointed for the execution of such magisterial orders as are addressed to several under-constables. The petty constables still retain their ancient functions as independent *custodes pacis*, with their own right of arrest; but in consequence of the in-

creasing business of the magisterial department they become more and more executive officers for the decrees, orders, and judgments of the several justices of the peace and sessions, in which they regularly appear to make their presentments and reports. After the decay of the court leet they were regularly appointed by the justices of the peace.



in England was pre-eminently the basis of a local parochial constitution. But legislation in early times made the most important and most valuable police functions touching paupers and the regulations of highways and bridges, the object of general regulations. This is influenced by the early introduction of payments in money into the English local government system. The economic self-government is accordingly rooted in the system of local taxes, which appear in the eighteenth century in five separate forms—

1. The *Church rate*, which has retained a more autonomic form, and is voted by the vestry according to annual requirements; on the model of this the later poor rate was created.

2. The *poor rate*, dating from the statute of Elizabeth, is assessed by the overseers of the poor, according to the necessity of the case. In the years 1748–1750, it attained an average of £780,000; in the years 1788–1785, of £2,000,000; and in 1801, amounted to £4,000,000.

3. The *county rate*, consolidated by 12 George II. c. 29, as a district rate for the courts of justice and police, is raised upon the scale of the poor rate, and amounts at the close of the century to about £200,000.

4. The *borough rate*, for the municipal, judicial, and police administration, is raised upon the same principles.

5. The *highway rate*, supplementary to labour in kind, for the maintenance of the highways, now amounts to a considerable sum, certainly more than £500,000.

By hundreds of statutes and by the practice of the courts the nature of these local rates has been established as real taxes, all which are to be raised from the “visible profitable property in the parish.” According to a later report (1848), there were not less than 180,000 parochial officers annually employed in connection with their assessment. Their total, however, at the close of the century exceeded the already antiquated land tax by more than four times the amount; in the year 1808, it came to £5,948,000. These taxes are further supplemented by the rates levied by the overseers of the poor and highways, whose offices were instituted in the period of the Tudors, and who, as taxing officers of the parishes, take a somewhat more independent position. Their chief function is to assess, raise, and apply the local taxes, and to summon the vestry to pass the necessary resolutions.

Connected with these parochial offices and taxes are the vestries as organs of economic self-government. The parish meetings developed themselves first of all out of the church rate, as these contributions were originally voluntary. But the contributions towards provision for the poor, which had their origin in equally voluntary subscriptions, were very

soon turned by the Tudor legislation into legal obligations, according to a legally fixed scale. There lacks accordingly for these purposes a sufficient object for independent parochial deliberations, and all the more so as the overseers of the poor are not elected, but are appointed by the justices of the peace. The case of the highway government is analogous. Since the chief current business of these vestries is confined to assessing the parish rates, the degeneration, which is seen in the municipal corporations, is again met with here, and the place of the parish meeting is more and more taken by permanent committees. Both legislation and practice have developed this formation of *select vestries* in the following directions :—

Committees formed by custom, composed of quondam churchwardens and overseers of the poor, supplying vacancies by co-optation, were recognized by the practice of the courts as “good customs,” and as legitimate representatives of the parish.

By local and private Acts of Parliament select vestries became more and more frequently formed for individual parishes on the same pattern, as by 2 George II. c. 10, for Spitalfields, the select vestry was to consist of the parson, the churchwardens, overseers of the poor, and such persons as had once discharged such an office, or who had paid the fine for non-performance. This example was followed by a number of further local acts.

By special acts, on the re-building of churches, select vestries were often appointed of the ecclesiastical parish, apart from the old connection with the civil parish. By 10 Anne c. 11, especially, a commission for the building of fifty churches in and about London, was empowered to form, with the consent of the bishop, “a select vestry, from a suitable number of wealthy parishioners in each parish,” which should afterwards complete its numbers by co-optation.\*

The increase in the poor law burdens and the numerous complaints brought against the administration, led, towards the end of the century, to the famous Gilbert's Act (22 George III. c. 83), which establishes new principles of pauper management, in such parishes as are willing to accept the Act. By this Act the raising of the rates was separated from the current administration, and a system of paid *guardians* was instituted. Several parishes might unite and form a union of parishes for the management of the poor, and organize a workhouse with a view to putting industrial occupation in the place of pecuniary alms.\*\*

\* A survey of the conditions in a number of parishes in rather later times is given by the Reports on Select

and other Vestries, 1830, No. 25, 215.

\*\* Gilbert's Act is the pattern for the total poor law reform in the nine-

The centre of the economic self-government is thus to be sought in the parochial offices, the discharge of which is uniformly enforced by law.

III. The necessary cohesion between the magisterial and economic self-government is brought about by the fact that the higher officers of the self-government form the court of higher instance of the parishes, so far as this is necessary for securing the due execution of the administrative laws by the local board. This hierarchy of office supplements the administrative law, being bound up with the central departments of State and the central courts. The local rating system completes the financial administration in a rationally ordered relation to the general State taxation. Both elements are inseparably blended together, yet in such a manner, that in the one the character of the magisterial department is especially prominent, and in the other the element of taxation is the chief factor, and is only controlled by the magisterial department.

The whole system manifestly converges in the police administration. The police power has now become the immediate political bond of European society as now constituted, and is therefore in England as various and as comprehensive, and pervades all the social relations of civil life in the same way as on the Continent. In England there is wanting no function of what we call the "*Polizeistaat*," yet with this difference, that the police is not controlled and administered by agents of the central government, but by honorary offices, by men of property and education; in the towns by unpaid notables, who have a permanent office by virtue of royal appointment. By their efficiency, these commissions of the peace have thrust back from them the superintendence residing formerly in the central government, have transferred the old powers of the privy council to a reference to the law courts as to questions involving legal principles, and have referred all else to a "correspondence" between the lord lieutenant and the Home Secretary. But the important element, which this local government brings with it into Parliament, is the intimate acquaintance with public business. Quite three-fourths of the members of the Lower House were, down to the first Reform Bill, practical administrative officials in this sense; not in the service of the party governments,

teenth century. On the other hand, the representation of the ratepayers in the English borough administration was first instituted in the system of elected representatives by the Municipal Act of 1835. The creation of an elective representation of the rate-

payers of the county rate, that is, a representative body side by side with the bench of magistrates, who are appointed, not elected, has often been attempted by modern bills, but has not yet become law.

but in a position of full independence, which even under party changes has maintained the integrity of the administration, and as a court of higher instance for economic self-government has preserved an impartial character.

The weak side of the system is certainly to be found in the executive organs and the ministerial officers of the local government, especially the constables, who even in the eighteenth century were reduced to such a subordinate position, that it was only too frequently necessary, by the imposition of fines, to force men to take the office. Complaints against the overseers of the poor and of highways, in consequence of their reluctant, negligent, and mechanical method of discharging their duties, are in this century very frequent. A certain want of spontaneous activity is on this account also observable in the administrative system of the municipalities.\* But in general the excessive number and the variety of the smaller offices and the jury service kept alive even among the enfranchised middle classes a knowledge of public business and an interest in it.

Scanty as are the statistics of the eighteenth century, they yet allow of an approximate estimate of figures. We find at close of the last century in England and Wales 3800 active justices of the peace (among them dukes of royal blood and numerous lords); at least twice as many gentlemen as militia officers, deputy-lieutenants, and sheriffs; about 10,000 jurors at the county assizes, and four times a year at the quarter sessions. And then in about 14,000 parishes and townships, changing once a year, at least one constable, an overseer of highways, two churchwardens, from two to four guardians of the poor, and other sub-offices and committees—perhaps about 100,000 persons, who were employed in assessing taxes alone. The sum total of this activity forms the material part of the internal government of the country; all developed out of the simple elements of the State as it existed in the

\* In the urban parishes the system of churchwardens and overseers of the poor and of highways, as well as the rating indispensably connected therewith, is similar to that in the country. But it must be remembered that this new formation had taken its own independent course, without any connection with the old municipal government, which, having sprung from the old court leet, served for the judicial and police administration, for the office of justice of the peace and the formation of the jury, as well as for the government of the old municipal property. In towns which consisted of several

parishes, this separation was externally noticeable, as every parish, for the purposes of poor law and highway administration, did not form a mere quarter of the town, but an independent community with independent rights and duties. The citizens, too, for these purposes, consisted of persons of different positions. The duties of the parish were performed, and a voice in the vestry was enjoyed by all parishioners; whilst a share in the municipal government was only accorded at most to the old suitors of the court leet, but generally only to the capital burgesses, or a similar small body.

Middle Ages. It is the "State" in those functions, which transform the character of society, and accustom the people not merely to run after money and pleasure, but to gain the practical understanding of, and the right sense for, what is necessary to the common weal.\*\*

It is manifest to what an extent this personal activity in the service of the commonwealth must influence a body of electors, that in the eighteenth century was limited to 200,000 at most. For this reason the county and parish unions became the most important sub-structure of the House of Commons, to which we shall again refer in Chapter I.

## CHAPTER XLVIII.

### IV. The Development of the Administrative Jurisdiction.

SINCE the days of Magna Charta, a number of new administrative principles had been proclaimed in England, first in the royal charters, and later in assizes and in parliamentary statutes, in the confidence that the principles thus laid down would be adhered to. Similarly, in modern constitutional charters, a number of "fundamental rights" are enumerated, in confidence in their *bonâ fide* execution. But England early experienced that, under a party government, these principles are not followed, and centuries later the misgovernment of the Stuarts showed that even a degenerate monarchy did not bind itself to the most solemn legal sanctions, that the responsibility of the ministers was not sufficient for this purpose, but that a special legal protection was needed by the subject, in order to guarantee the legal course of the innumerable

\*\* Self-government forms the exact contrary of the ideas of the nineteenth century of a representation of "interests," which as such can attain to no unity in the State. The county, borough, and parochial unions are not local parliaments. These intermediate processes between the State and the individual are not intended to foster the interests of the individual, but to accustom the individual to fulfil his public duties. Self-government forms just as much a contrast to autonomy,

which has produced upon the Continent an all-pervading separatism in provinces, districts, towns, and smaller communities, owing to the laxity and passiveness of the executive power. It is a mere playing with words to call every tendency towards self-help, "self-government." The English self-government gives comparatively little scope to the local and individual will, but grants all the greater political rights by uniting the equally organized communities to a whole in Parliament.

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The ordinary courts proved insufficient for this purpose; for the *ordo judiciorum* was limited from the beginning to customary methods of action (*legis actiones*) for the protection of private rights, and for giving penal satisfaction. The newly created legal provisions for the exercise of the rights of political sovereignty, at no time came within the sphere of the competence of judge and lawmen or of judge and jury.

The ordinary civil courts, indeed, serve indirectly to regulate the limits of public law, so far as they render the official answerable who, by exceeding his official powers, injures a private individual, *extra officium*. Furthermore the claims of the State upon the purse of its subjects are brought within the legal pale by the constitution of the Court of Exchequer as a common law court. The *actiones adversus fiscum* are, in England, only addressed to the Lord Chancellor by way of petition, but afford, in the result, a sufficient protection.

Further, the ordinary courts of criminal law serve to define and interpret the public law by establishing, in their decisions as to high treason, sedition, assaults against peace officers, and other delicts against the State, important precedents in questions of administrative law, which no Government can disregard. In still wider spheres they decide, by their penal sentences on abuses of office, the competence of all organs of the Government. Still more extensively, they secure, by their judgments, the interpretation of the laws affecting the police, customs, taxes, and royalties. In England this has taken the form of a summary jurisdiction, by which one or two justices of the peace administer justice over the wide field of police excesses, frauds, and contraventions of the customs, taxes, post, and stamp laws, by which means about the half of the police and financial law is placed under a sufficient legal control.\*

This legal protection, however, is still insufficient for the needs of a constitutional State, because of the inevitable influence of the party system upon the Government. For official excesses, malicious abuse of office, as well as other matters within the jurisdiction of the ordinary courts, form

\* This vocation of the common law courts has in England never been overlooked, and has adhered strictly to the national principles of our administration of justice, according to which the court has to try independently every major supposition of its decision, unbiassed by any previous decision of any administrative body. The limita-

tions of justice in the case of officials and as to *actes administratifs* which is peculiar to French law, is foreign to English law, and in England could be dispensed with, owing to the fact that the common law courts discharged also the functions of a supreme administrative tribunal by their writs of *mandamus*, of *certiorari*, etc.

only the minority of the excesses compared with the endless chain of abuse and mischief that may result from the tamperings of a party Government with the police, financial, and military powers of the State. England experienced this to excess in the Middle Ages, but most of all under the Stuart Government. The Stuart system of Government in this sphere also brought about the full development of a reliable legal control over all those parts of the administrative law which were exposed to the abuse of party. The legal protection afforded against it, forms, on the Continent, the so-called *administrative jurisdiction*—that portion of the political structure that may be least of all overlooked.

As formerly in Germany the first institutions of the kind were attached to the Imperial Court of the Holy Roman Empire to enable it to interpret and carry out the *polizei-ordnungen* of the realm; in like manner the English control has become developed in the police laws, which form the centre and foundation of the system, to which are attached the less important departments in analogous application. But the administrative jurisdiction in police matters presupposes the distinction between two materially different kinds of administrative laws, which may be distinguished under the names of *police penal laws*, and *police administrative laws*.

The first class, the *police penal laws*, is addressed to the subjects, and comprises those parts of the police regulations which can be enforced by simple and direct commands and prohibitions. In this great province of police law, which is based upon daily recurring uniform needs of civil order, there was no necessity for new institutions. The summary penal jurisdiction of the justices of the peace handles this department in England in a short criminal procedure on public prosecution, under the name of *convictions*. The system of legal remedies by appeal, in this case, is in England comparatively limited, and has no special peculiarities.

The other class, the *police administrative laws*, on the other hand is addressed to the officials, and includes such needs of the civil order as cannot be satisfied by simple commands and prohibitions addressed to the subjects, but can be met only by magisterial orders, decrees, and measures adapted to the individual case, after previous examination of the circumstances, expressed in England by the term *order*.

The magisterial activity is thus divided into the two spheres of *convictions* and *orders*. A supplementary administrative jurisdiction was only needed for this latter department (for the administrative laws in the narrower sense), that is to say, for those laws and ordinances which direct the action of the

magisterial acts, which day by day are encountered within the sphere of individual rights.

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officials. The legal control of magisterial activity can, however, as experience teaches, be properly effected only within the magisterial sphere itself. Even in the Norman administrative system a considerable number of administrative controls had been created for this purpose, all of which reached their normal height in the Tudor period (above, p. 532) in the following manner :—

By the disciplinary or corrective penal law, the officials were forced to fulfil their duties as required by law, under pain of dismissal or summary punishment by fine.

By virtue of the superintendence *ex officio* an illegal or improper act of the authorities is annulled or altered by the superior court or council.

A remedy of complaint finally arises through the double position of the court or council exercising the supervision. An illegal or improper administrative act is quite as often, if not oftener, invalidated on the motion of the injured party as it is officially.

In the Tudor epoch, in addition to the common law courts as the higher court of the *justiciarii pacis*, the Privy Council was a general supervisory court of higher instance, in which complaints might be lodged, and which subjected the administrative acts of the lower authorities to a revision, annulling or altering them according to circumstances (*vide* p. 532). The gross abuse of these royal powers under Charles I. led, however, to the abolition of the Star Chamber (16 Charles I. c. 10), whereby every jurisdiction of the King in council, and every kind of legal decision, on complaint, petition, or otherwise, is withdrawn from the Privy Council; so categorical was the language of this Act, that no minister of the Crown dare countersign a writ which decided a legal question in dispute, without immediately exposing himself to impeachment. But, as the lodging of complaints before the King on appeal was still constantly in use by injured parties, and as such an institution was indispensable for redressing just complaints in the administration of the country, it was accordingly henceforward exclusively left to the justices of the common law courts to issue the proper writs, in the name of the King, in complaints on appeal.\* The modern proce-

\* The limitation and definition of this administrative jurisdiction is dependent upon an interpretation, which the courts of common law had to give to the complex stat. 16 Charles I. c. 10. In the preamble, *petitions or suggestions made to the King or to his council*, are spoken of, and further a prohibition, by *English bill, petition, articles, libel, or*

*any arbitrary way to determine or dispose of lands, goods, etc., to determine any matter or thing in the said court by any judgment, sentence, order, or decree, etc., with express reservation of a habeas corpus in cases of arrest—that is, all sorts of complaints against material decrees of the administration, which immediately contain an encroachment*

dure was formed readily enough from the continual connection of the royal council with the common law courts, in the person of the Chancellor, through whose *officina* the writs also passed. Administrative complaints of the highest instance were now assigned to the *justiciarii regis* to be tested and decided. The highest court (generally the King's Bench) became thus the supreme administrative court, not by virtue of the old ordinary competence of the courts, but by virtue of a newly created legal control for all magisterial and official departments, which arose only in the later Middle Ages (as in Germany).

In England, as in Germany, however, it was soon found that a bench of judges, placed at a distance, can scarcely determine such disputed points otherwise than according to the reports made by the subordinate departments, and has accordingly little effect in redressing the abuses of the police power. In order to give effect to these legal complaints, there was needed rather a further development of the magisterial system in the provincial and local spheres, such as was formed in the larger German provinces in the seventeenth century by the permanent *Verwaltungscollegien*.

But in England no "separation of justice and administration" was necessary for this purpose. The office of justice of

on the property or the liberty of the person. Herein the courts of common law have, however, secured to themselves an unusually wide discretion relative to the question of lodging complaints and proving facts, as well as with regard to the practical needs of the administration, and furthermore, when in doubt, have followed the maxim: *boni judicis est ampliare jurisdictionem*. The English central courts thus took up a position analogous to that taken in Germany by the *Reichshofrath* and the *Reichskammergericht* as a supreme court of appeal in complaints arising from imperial and provincial police laws. Here, as well as in England, these questions of administrative jurisdiction form their own special department, quite distinct from the ordinary civil and criminal jurisdiction, and display the following characteristics:—

The order (police-resolution, command, or other administrative decree) is the resolution of the authorities as to their own legal competence, and according to the nature of it the legal steps to be taken vary.

The administrative complaint is accordingly characterized as being the

subsequent testing of a *decedum* of the authorities from the point of view of its legality (*revisio in jure*).

There is on that account no *actio* for the recognition of an individual right, but a *querela* for wrongful application of the rules of administrative law; the maxim *tot sunt actiones quot sunt jura* is not applicable in this case, but it is an *imploratio officii judicis*, uniform in all its parts, consisting in an appeal to the higher authorities.

Because, therefore, the question is one of the subsequent testing of an act of official authority, the decisions of the superintending authorities are held to be concurrent, and there does not arise a *res judicata inter partes*. For this reason the ordinary proceedings are not resorted to, but (as in the German *Reichsgerichte*) a procedure by writ of certiorari, writ of mandamus, and other supplementary writs.

Finally, the legal complaint is limited, according as practical needs require, to more important cases (*causae duriores vel atrociores*, as the practice of the German court called them), that is, upon the ground which is known by experience to be exposed to the abuse of party.

the peace was originally at once a police and a judicial office (*custos et justiciarius pacis*). It had further developed itself in this spirit. It now comprised and combined in itself a power of preliminary examination, a police magistracy, and a court of higher instance for the parochial government; the quarter sessions were at once a criminal court and a county government board. There was no reason for altering this system. For the justice of the peace stands near enough to the local police to be able to examine into the necessity and the reasons for any police act; he is placed in the midst of civil life, that he may keep himself free from bureaucratic partiality. He possesses, moreover, the full independence of the judicial office by his property, and in like manner the permanence of the judicial office, since the honorary official cannot be dismissed on party considerations. The experiences made on the latter point in the Stuart era were so discouraging, that no later ministry in England ever again attempted to dismiss the justices of the peace as a party measure. Habitual activity and co-operation on the bench with others in discharging the magisterial duties combines in the honorary office the sense of honour and duty of the higher class, and the same feelings of a professional justice, in one single person, and thus produces the character of the judicial office in its best form.\*\*

In consequence of this permanent combination of a police and judicial office, the administrative sphere in England retained the name and character of a *jurisdiction*. As in the canon law the name *jurisdiction* was retained for such functions of the higher administration, so here also was the form and spirit of an administration of justice preserved.

All decrees of the police authorities, which affect the person or the property of the party concerned (distinct from mere formal decrees, precepts, warrants, etc., by which proceedings are begun), are issued in the form of an *order*, i.e. a formally framed written resolution, drawn up by a clerk, and in more important cases signed by a second justice of the peace as well.

\*\* In Germany the development of the magisterial system went hand in hand with the separation of justice and administration, as the experience had been made, that the customs, views, and procedure of the judicial office were not suited to the administration, and *vice versa*. In the place of the *querela* of the central courts now came in Prussia and elsewhere the *Geheime Staatsrath*, the provincial *Regierungscollégien*, *Landräthe*, etc. The necessity for the separation of justice and administration only applies to the professional

bureaucracy in its proper and accustomed departments. It does not apply to the system of honorary offices, upon which the English magisterial system has been for centuries built, and upon which it has arrived at full development. The reasons why, after an experience of two centuries, the higher honorary offices cannot be dealt with in respect of appointment and dismissal, to suit the changes of party, are given in Gneist, "Self-Government," pp. 485, 486.

Against this order, from which in the Tudor and Stuart epoch complaint could be made, as a matter of course, to the Privy Council by removal of the action by writ of certiorari, and only in exceptional cases by appeal to the bench of justices of the peace, there was instituted in the eighteenth century by numerous parliamentary statutes an appeal to the general and quarter sessions of the justices of the peace. The controlling jurisdiction of the central courts begins now to be curtailed, so that the parties are generally prohibited from applying to the central tribunals for a writ of certiorari.

According to the system of the eighteenth century, the majority of orders made by justices of the peace, in less important questions, are *ipso jure* final.

The more important cases are adjudicated upon by the justices of the peace in their corporate capacity, in the greater and petty sessions, and in the great majority of these cases also this decision is final.

Only in a comparatively small number of disputed administrative acts (now less than one hundred annually) the quarter sessions are appealed to, and in quite a few cases the common law courts. The course of procedure of police administration is as follows:—

1. The ordinary administrative court of first instance is formed by the *single justices of the peace*, who issue orders in the police department, especially such as affect public safety, order, public morals, health, the poor, highways, water, field, forest, fishery, trade, building, and fire, and particularly numerous orders against begging and vagrancy, as well as regulations of wages, servants, apprentices, and day labourers on the basis of Elizabeth's legislation. In many of these cases an order of two justices of the peace is prescribed, who then co-operate in the forms of a summary proceeding.

2. For more important police-resolutions of a court of first instance the *special sessions* of the justices of the peace of a hundred form a kind of court of intermediate instance, the periodical formation of which falls as late as the eighteenth century. The older laws had already provided for a meeting of three or more justices of the peace for certain matters. For the appointment of overseers of the poor even all the justices of the peace of the hundred were to be summoned together, etc. Occasion was thus given for a periodical meeting of all the justices of the peace of the hundred, which could also be practically utilized for the discharge of other administrative business. The chief town in the hundred was generally fixed upon as the place of meeting, a chairman and a clerk to the justices were chosen, and the order of the proceedings was determined. Legislation since the eighteenth

century has referred the appointment and confirmation of parochial officers, highway disputes, the grant of wine, beer, and spirit licences, and other matters requiring decision, to such special sessions, so that these sub-districts form an important intermediate stage of the administration.

8. The *quarter sessions*, which bring together all justices of the peace at least four times a year, are primarily a court of appeal from penal sentences; but at the same time also a district government board for the most important general business of the district: the making of the county rate, the appointment of treasurers of the county chest, and governors of the county prison and house of correction, for the issue of police regulations affecting the price of provisions, wages, etc. (according to the system of the Middle Ages), settlement of fees of the county officials, granting of licences for powder-mills, etc., and the registration of dissenting chapels (1 William and Mary, c. 18)—a great mass of discretionary business ordinarily known in practice as the *county business*.

With this county business is connected the hearing of appeals from the orders of individual justices of the peace and the petty sessions, whenever an appeal is expressly allowed by the statutes, as was generally done in more important questions in the administrative statutes of the eighteenth century, with the further clause that an application to the central courts by writ of certiorari should no longer be allowed.\*\*\*

The appellate jurisdiction of the courts of common law retires more and more into the background, as the decisions falling within the sphere of the office of justice of the peace become final, and at this period is exercised in hardly more than one hundred cases annually, with the following distinctions:—

1. A writ of *certiorari* is the normal legal method, by which, on motion, a police order that has been issued is sent to the higher court for decision as to whether the administrative act is in accordance with existing law, whether the court is competent, and whether the administrative law has been rightly interpreted. This constitutes, in fact, a kind of *revisio in jure*.

\*\*\* This interposition of the quarter sessions as a court of appeal for the final decision of disputed cases is connected with the striving after power of the dominant class. Whilst the quarter sessions only form a court of higher instance in a few statutes of the preceding period, since the Restoration the statutes more and more frequently allow an appeal to the general sessions, which are now in cases of summary

convictions the regular court of appeal, and the court of higher instance for complaints from the orders below. Even to-day the historically explainable rule exists, that an appeal to the quarter sessions only lies where it is expressly given by law, and that the remedy to the courts of common law by writ of certiorari is only taken away, where it is expressly taken away by law.

This legal remedy exists as a rule for every oppressed party, where it is not expressly taken away by law. But even where no *certiorari* is reserved by law, it yet remains in force for cases of absolute incompetence and absolute nullity of proceeding. It is also always employed, in the public interest, and can be resorted to by the ministry for the time being, by its attorney-general or other legal representative. (a)

2. Against coercive measures by imprisonment the universal legal remedy is the writ of *habeas corpus*, controlling not merely the question of arrest in criminal proceedings, but every administrative execution in police, finance, and other cases. As arrest is, according to the English system, the ordinary coercive measure for enforcing the regulations of the administration, the *habeas corpus* in the central courts took the form of an universal legal control of the administration in the stage of execution. (b)

3. A general subsidiary legal measure is further a writ of *mandamus* for enforcing the injunctions of administrative law against towns, corporations, and all other authorities and private persons, where the ordinary supervisory jurisdiction, the system of disciplinary punishments and that of the ordinary legal measures, proves insufficient. This supplementary writ fills all gaps, which owing to the unequal development of the police powers are to be found, especially in the municipal governments, and replaces also the measures

(a) It was only since the time of the Restoration that this legal remedy began to be withdrawn from private parties. By 12 Charles II. c. 23, 24, the right to a *certiorari* was taken away in certain taxation cases. By 3 and 4 William and Mary, c. 12, all highway disputes are to be settled in the county, and no indictment and no order shall be appealed from by *certiorari*. In like manner by 1 Anne, c. 18, disputed questions as to the repair of bridges; but where "the right and the title to repair is called in question," the matter may come by report to the King's Bench (3 and 6 William and Mary, c. 11). In this way accordingly the legislation proceeds. The use of this remedy was moreover rendered difficult by the high bail required for the action and other formalities (8 and 9 William III. c. 33; 5 George II. c. 19, etc.). In later statutes the exclusion from a right to a *certiorari* became a standing clause. The exceptions, for instance, in bastardy, excise, highways, poor, turnpike acts, etc., show us that the appellate jurisdiction of the

courts of common law shall remain open, wherever considerable interests of property, fundamental rights, and principles of public law are involved. The difficulties attending the *certiorari* led in practice to a simpler mode: that the lower tribunal sent up a *special case* (*status cause*) to the court of common law for the decision of the question of law. The simpler mode has become very popular in modern legislation.

(b) It is the rule of common law that where the law empowers a justice of the peace to compel a person to any action, and the party there present refuse, the justice of the peace may send him to gaol, until he obey (Hawkins, ii. c. 16, sec. 2). To avoid the hardship of this administrative compulsion, the English statutes insert in many thousand clauses the penalty of fines and distraint, whereby the matter is decided in a summary manner. But imprisonment remains everywhere a supplementary coercive measure, as the *habeas corpus* remains as a legal control.

of *Zwangsetatisirung* which occur in our administrative systems in Germany. (c)

This system of administering justice in the police department, forms, as before said, the centre of administrative justice. The numerous experiences of the English party struggles have shown those weak points where party influence threatens administrative order, and where, accordingly, the ordinary supervisory jurisdiction needs to be strengthened by judicial elements. The administrative police laws have at all times shown themselves as being most in need of legal protection, and among these again the police licensing system is especially prominent, as being particularly exposed to the abuse of party. The other departments of administrative justice are analogous and supplementary.

In the province of the *militia administration*, the deputy-lieutenants exercise in their special and general meetings an administrative jurisdiction for disputed questions of military duty, immunity from service, etc., perfectly akin to the magisterial administration of justice.

In the province of the *standing army*, the office of justice of the peace confines itself to the specific maintenance of the Act relating to recruiting and a few subordinate points.

In the province of *local taxation*, the special and general sessions of the justices of the peace are the ordinary tribunals for the decision of disputed assessments.

In the province of the *central taxation*, for such taxes as are to be raised by assessment *in concreto*, impartial decisions are guaranteed by means of the commissions of assessment.

For the *municipal government* the writ of mandamus in many ways acts as a supplementary legal control, particularly applicable to illegal resolutions of the representative body.

In the *ecclesiastical* department, the legal control is given by a *recursus ab abusu* before a specially appointed ecclesiastical court (court of delegates), and partly also by writs of the central courts.†

(c) There is no point in the English self-government at which the execution of the administrative laws is not secured by corresponding measures of enforcement. The other *writs of prohibition*, or *quo warranto*, etc., supplement the legal controls, especially in the province of ecclesiastical and financial matters.

† As to the administrative jurisdiction in ecclesiastical matters, cf. Gneist, "English Verwaltungsgesetz," vol. ii. chap. vii. Our German so-called *Verwaltungs-jurisdiction* is purely the result of the need for strengthening the

control of the administration, so far as is necessary to ward off the abuse of magisterial power by parliamentary parties. For the daily action of the administration in England also, the supervisory jurisdiction and other administrative controls are regarded as sufficient. No one has ever yet entertained the idea of a "system" of administrative jurisdiction. The table of competence for the sessions of the justices of the peace alone (Keeming and Cross, "Quarter Sessions," 2nd edit. 1876, pp. 354-476) comprises more than one hundred headings of



In its general result the administrative jurisdiction makes the enforcement of administrative laws, *so far as in any point there is danger of a misapplication of them for party, and especially for election purposes*, independent of the ministry in power. The whole internal government of the country is, in consequence, unaffected by changes of government and by that party influence which the majorities for the time being in Parliament could bring to bear upon the *personnel* and maxims of the administration. The experience of many centuries as to the disastrous consequences of the party-system for the internal government completed this laborious structure of legal controls in the eighteenth century, and thus gave the English constitution a foundation upon which the conduct of the highest State business could be left to changing cabinets, without danger to the stability of the administration, to the integrity of officials, and to the security of individual rights. Thanks to this intermediate structure, England, peculiar in this respect, has succeeded in preserving, in spite of all changes of party government, the impartiality and integrity of the central and local Government, a result which all imitations of this Parliamentary constitution have, as a rule, failed in attaining, owing to the want of the necessary sub-structure. The English aristocracy has in no other point so tenaciously asserted its vocation to rule as in this; the want of a politically educated aristocracy on the Continent has in no other point been felt so keenly as in the deficient understanding of these preliminary conditions of a constitutional system.

appeals in administrative law, with innumerable variations both in times and procedure. A table of legal remedies in the central court, as supreme administrative court, a table of cases, etc., would, perhaps, be ten times as large. An attempt at a systematic

arrangement has been made by Gneist, "Self-Government," 3rd edit. 1871, chap. v. sec. 7. Neither the English nor the French *jurisdiction administrative* has as yet gone beyond the method of an empiric limitation, as need requires.

## CHAPTER XLIX.

## V. The Final Consolidation of the Ruling Class.

As the influence of the dominant class had already become established by the Restoration, the imprudent attack of James II. only conduced still further to strengthen its secure position, which was based upon personal duties and taxation. The magnates of the land had, since the days of Magna Charta, repeatedly appeared as the guardians and guarantors of the rights of the people; yet never with such a complete and entire success as in the "glorious revolution." As is the case in every political revolution, this one also was followed by an enhanced influence of the dominant class of society.

With comparative moderation the gentry now make use of their influence upon the legislation to secure to themselves by means of the electoral qualification the control of the Lower House. By 9 Anne, c. 5, the knight of the shire must have £600 annual income, derived from freehold or copyhold, the burgess in like manner £300 from real estate. The qualification for the office of justice of the peace is fixed at a higher amount, in order to secure to the landed interests the influence of the police power in the county. For the justices, who were counted by thousands, by 5 George II. c. 18, 18 George II. c. 20, an income of £100 from freehold or copyhold is required, such freehold and copyhold being inherited or held for life, or at least for a term of twenty-one years; no special qualification is needed for lords, their eldest sons and heirs, or for the eldest sons and heirs of a person possessed of an income of £600 derived from real estate. At this time arose the custom among aristocratic families of giving, especially to the eldest son, that education in schools and universities which through the office of justice of the peace leads onward into Parliament. The justices of the peace thus qualified needed no longer the assistance of a body of jurists learned in the law (*quorum*), and accordingly it becomes more and more the rule to appoint all justices of the peace with the higher qualification of the *quorum*, and thus to make the appointment of jurists learned in the law superfluous in the commissions of the peace. A qualification with numerous

grades was finally laid down for the officers and commissioners of the militia. All other limitations of the gentry and their titles was left to the practice of the courts and to custom.

Moderate as these privileges appear, when compared with the class privileges of the Continent, yet they are all based upon a well-considered system, calculated so as to concentrate every element of political power in a class essentially homogeneous, and to close up every opening where a renewed attack upon their position might be apprehended. The significance of these institutions is, when they are viewed as a whole, so thoroughly patent, that it cannot possibly be misunderstood.

1. *The military power*, above all, is secured to the ruling class by the formation of the militia under commissioners of £200 income, and a corps of officers of from £50 to £1000 income from real estates, etc. (p. 682). By its side a standing army is in an entirely precarious position by being dependent on the annual vote of supplies and the power of command in the Lower House; it is led by officers whose patents are, at the purchase price of £450 to £6000, from ensign up to lieutenant-colonel, only attainable by the sons of the gentry, a plan which also furnishes an honourable means of providing for younger sons. (1)

2. The qualification of £100 income from real estate as the necessary condition of holding office as a justice of the peace, further strengthened by a tacit renunciation on the part of the justices of all salaries and pay whatever, leads to a firm establishment of the *civil powers* of the ruling class. In order to estimate aright the significance of this privilege, it is necessary to call to mind the great extent of these powers, which control the whole internal life of the county and the government of the parishes. The magisterial gentry now thrust out the professional lawyers as such from the commissions of the peace, and even give the presidentship in the criminal and administrative business of the quarter sessions to a chairman chosen from among themselves. To this must

(1) The mistrust of the ruling class was at this point naturally increased by the growth of the standing army. Its strength of 16,000 men under George I., considerably increased during the seven years' war and the American war. After the close of the latter, 40,000 men were kept on foot in England and Ireland, who in consequence of the wars with France, again became a considerable army. Beside these the militia was at times in a very decayed state, and thus may

be explained why in the regulations of 1763 the purchase system of officers' patents appears already fully developed. From time to time we find again the militia system strengthened, at all events sufficiently so for the maintenance of internal order and the preservation of a military spirit in the upper classes, among whom personal courage and good equipment could in some degree compensate for the deficiencies of military training and discipline.

be added the political influence of the grand jury, which, at the assizes, is regularly composed of justices of the peace and analogous elements, as well as the office of sheriff, which, by reason of the heavy honorary expenses connected with it, is only open to the gentry. (2)

8. This influential position is still further consolidated by the *system of entails* which, though existing in former centuries, only in the eighteenth century became apparent in its immense political and economic importance. The social tendency of the landed interests to secure to themselves the property in the land by means of long trusts, and to exclude others from the right of acquisition, did not in England attain the fullest development, as the Crown adhered in principle to the alienability of the knights' fees (cf. above, p. 427). The inventive ingenuity of lawyers, however, found the way to construct entails, by which the inalienability of the land is settled in favour of an heir, and can, by constant renewal of the arrangement, be continued from generation to generation. This preference, not in itself very extravagant, kept back in England the natural development of tenure. In the eighteenth century, by commerce and colonial possessions, an immense accumulation of capital had arisen, which the gentry, in order to gain political influence, invested for the most part in the purchase of land at home, for this purpose buying up the medium-sized and small estates. It was this combination that gave rise to the present accumulation of real estates, which unites four-fifths of the profitable land in the hands of seven thousand of the nobility and landed gentry. (3)

4. The gentry class thus built up from below, accordingly reserves to itself the *exclusive composition of the Lower House* by persons chosen from among it by virtue of a qualification of £600 annual income from land for the county members, and £300 for the burgesses. Still more effectually do the heavy expenses of every parliamentary election, and the system of unpaid representatives, which, since the seventeenth century, owing to their tacit refusal to accept any remuneration, has become a point of honour and a rule, serve

(2) The qualification of £100 income from real estate does not, indeed, exclude civic dignities who own land clergy, etc., and is not binding upon the municipal commissions of the peace; but for the great county union it gives the landed gentry a decided ascendancy and a firm political organization, which, owing to the concurrent powers of the commissions of the peace, also pervades municipal life.

(3) A clear survey of the difficult system of entails is given for German readers by Thomas Solly, "*Grundriss des Englischen Rechts über Grundbesitz und Erbfolge*," Berlin, 1853, and also by Von Ompteda in the "*Preuss. Jahrbücher*," 1880, vol. xlvi. p. 401 seq., together with a statistical survey of results arrived at by Arthur Arnold ("*Free Land*," 1880), viz.: 7000 landowners, as possessors

the same end, and thus render the entrance into the most powerful body in the realm only accessible to the richer and richest members of the gentry. (4)

5. Finally, this position becomes consolidated by a *second representation of the ruling class* in their most aristocratic heads by the hereditary peerage. If in the former century the peerage had become but a powerful part of the gentry, there were now newly created by patent in the century from 1700-1800 no fewer than 34 dukes, 29 marquises, 109 earls, 85 viscounts, and 248 barons. The importance of this lies in the permanent influence secured to the landed interests in the legislature; all that is feudal in it is only name and legal fiction, calculated to secure to the first families of the ruling class an hereditary seat in the council of the realm, and to regulate the manner of inheritance. The peerage thus formed is nothing but a second honorary representation of the gentry, independent of varying election influences, from whose ranks it proceeds, and in whose ranks the whole family remains in the background, except the peer himself. The creation of 268 peers and 528 baronets under George III. denotes the climax of this position. (5)

sors of 10,900 estates of more than 1000 acres, are in possession of more than four-fifths of the profitable soil in the United Kingdom; the peers alone are in possession of almost one-fourth; in Scotland five peers are in possession of quite one-quarter of the soil; one-half of England is in the possession of 150 persons, one-half of Scotland in the possession of 75, one-half of Ireland in that of 35; the remaining fifth of the soil is divided among little more than 100,000 possessors of more than one acre.

(4) Here, too, the system is adhered to of attaching aristocratic privileges to burdensome performances, so as in a certain measure to buy them. It is this tendency which, since the Restoration, made a renunciation of salary a point of honour. The same tendency with deliberate prudence left untouched the gross abuses of parliamentary elections, which, even at the present time, make every fresh election a pecuniary sacrifice amounting to several thousands of pounds.

(5) The manner in which the peerage could still be regarded as a continuation of the nobility of the Middle Ages, is characteristic of the social conception of all pedigrees. At the time of the Reform Bill, among 249 lords no fewer than 188 asserted them-

selves to be of the mediæval nobility, whilst a somewhat strict investigation by Sir Harris Nicolas proved, that of the English peerage as existing in 1830, only one-third were incontestably descended from the knighthood of Elizabeth's reign, and among these only a small fraction could lay claim to baronial descent. The 9458 families who, according to a parliamentary investigation in 1798, were entitled to bear family arms, certainly contain numerous elements which correspond to the lower nobility of the Continent, and who in their time contrived also on the Continent to prove their "tournament and chapter right." But among them the majority are families of the modern gentry, who have registered their arms according to the prescribed rules. Special knights-corporations and guilds, autonomic rights of family, property, and inheritance, by which in Germany the gulf between the privileges and the political duties of the upper classes became with each successive century more extended, have certainly never existed in England. The popularity and the political influence of the great families kept this kind of self-deception far removed from the heads of society, and thus moderated the pretensions of the lesser gentry. Every one knew, for example,

Side by side with this great increase in the influential position of the ruling class there can be unmistakably discerned a relative diminution in the political and economic importance of the English middle classes, which, in the course of the eighteenth century, makes itself more and more felt. The influence of these classes in elections is, it is true, still of importance for the conditions under which the ruling class exercises its dominion over the executive, and for the spirit in which this dominion is employed, but yet it is only a moderating element.

Throughout the whole period, the enfranchised middle class pre-eminently contained within it the elements which perform the jury-service and fill the offices of the hundred. It is still limited in the counties by the mediæval qualification for a juror (forty shillings income from freehold), and in the boroughs by active participation in the corporation. But these legal conditions have in individual cases long ceased to be exact. The qualification for a juror is at the commencement of this period increased to £10, but the franchise of the small freeholders is retained. Conversely, copyholders of £10 have now been admitted to the jury and the local offices, without obtaining a right of suffrage. By the buying up of the still existing freeholds and by the withdrawal of the squires, occupied with political life, from personally farming their lands, such an enormous increase in the leasehold interests arose, that the whole of the middle class in the country in its dependence upon the landlords was ordinarily described as "farmers." Hand in hand with this economic dependence, we perceive an ever-increasing decay of the spontaneous activity of the middle classes in parish and corporation, an increasing formation of select bodies and select vestries, and a dangerous indulgence of legislation and practice, which ever more extensively kept excusing the more intelligent trades and professions from serving on juries and discharging the duties of the parochial offices. The middle classes, as a whole, lacked a cohesion in organized bodies, such as the ruling class had in its quarter sessions, its grand juries, and corporations. The number of electors was in the year 1768 given only as 160,000 (Massey, i. 338), and in the course of the century probably did not exceed an average of 200,000. But the weight of numbers was more than counterbalanced by the predominating in-

that the male line of the proud old Percies has become extinct no less than three times, and that the family name has passed on to the husband of the heiress-daughters; and that the Percy, Duke of Northumberland, created under George II., was Sir Hugh

Smithson, son of an apothecary. The real genealogical tree of the peerage is formed by the hereditary duties performed by the owners of the landed estates for the sake of the commonwealth.

fluence of the ruling class. The right of suffrage of the middle classes is of importance as a protection against the better legal education and the social exclusiveness of the ruling class; that its value was well known is shown in the long conflict touching the election of the notorious Wilkes. But all political initiative and party formation has its seat in the ruling class. The pocket constituencies and the dominant influence of the gentry in all local government make the middle classes a kind of *retinue* of the upper classes, whose vote is only of importance where there is an open contest between the parties in the State, but not as against the strong common interests of the upper class.

In a still greater degree is this of course true of the whole of the rest of the people *infra classem*, of the smallest freeholders who were excluded from the franchise, of the whole class of copyholders and of the non-propertied working classes. The entirely irregular form of municipal parliamentary representation had, however, this result, that in a small number of places the old right to a vote of those paying scot and bearing lot, still continued, which brought about purely democratic election-meetings, even down to the labouring classes. In this direction the ruling class permitted every anomaly to remain intact, as well as various kinds of popular turbulence at elections, so as to prevent the idea becoming prevalent among the lower strata of the people that their class was excluded from representation. The tumultuous movements of 1780, and the proposals of the Whig opposition to introduce universal suffrage, were forerunners of the reform bill which was still half a century distant. They were hasty, and as yet quite immature proposals, and therefore these movements again disappeared for a whole generation.\*

\* The position of the ruling class may be regarded down to the close of the century as a perfectly firm and secure one. The bases of the aristocracy were and remained unassailable, so long as it in reality represented an *aristodoulie*, which claimed a precedence in public duties, and which bought every single one of its privileges (in the militia as on the commission of the peace, in the influential offices of the military and civil administration, in the Upper and in the Lower House)

with money and personal services, with which the lower class neither wished nor were able to compete; whilst, on the other hand, in every material point in which the most jealous social views could demand a formal equality of rank, such equality was actually recognized. It was only an essential revolution in labour and wealth which in the nineteenth century was able successfully to attack the exclusive dominion of this aristocracy.

## CHAPTER L.

## VI. The Formation of the Lower House.

THE House of Commons, as the incorporation of the *communitates* bound together by self-government (Chapter xlvii.), consists in its now definite form of

80	members for the	40 counties of England,
12	"	12 " Wales,
50	"	25 cities,
339	"	172 boroughs,
16	"	8 seaports,
4	"	2 universities,
45	"	Scotland, since 1706,
100	"	Ireland, since 1801.

In a process of formation extending over four hundred years these elective bodies have gained that internal cohesion which has made the English Lower House the most powerful body in the civilized world, and has enabled it, in spite of the apparently capricious changes of parties, to carry on the government of a world-wide empire with success. If the outward extent of these constituencies be compared, from the great county of York down to a decayed borough, their descending scale is almost like that of the old German imperial estates from the Electorate of Saxony down to the free imperial cities of Aalen or Bopfingen. But if the importance which the whole mass of these *corpora* attained in the British realm be compared with that of those in the old German empire, we shall find ourselves forced to acknowledge that the strength and importance of a national representation is entirely dependent upon the internal cohesion which holds together such bodies among themselves and unites them with the political commonwealth. Were it merely a question of combining as great a number of intelligent and able men as possible in constituencies as nearly equal as possible, then many imitations of the English Parliament would probably achieve quite as much as the original institution. But that cohesion is dependent in England neither upon the democratic principle of local election (urban district and provincial representations), nor upon the feudal principle



of hereditary estates (district and provincial estates), but upon the opposite of both, upon the system of local taxation and self-government, which again here must be set forth as being the primary basis of the English Parliament.

I. The system of local taxes in the form of a *county, hundred, or tithing rate* had already arisen in the days of the Plantagenets. Somewhat later, the church rate was added to these for the parishioners. With Tudor legislation the relief of the poor, the highway burden, and the duties arising from these were assigned to the parish, upon the broad basis of the tax-paying "Christian family." The amount of these local burdens increased down to the close of the eighteenth century to an annual sum of more than £5,000,000, more than that of the direct taxes, and at times equal to half the whole revenue of the State. This being the case, the legislature could not shut its eyes to the fact that State taxation and local rates could no longer continue independently of each other, that, in consequence, in the modern State there was no room for an autonomy of the townships and districts in taxation, and that the whole of the needs of the commonwealth and the whole of legal taxation must be regulated and arranged upon one uniform and systematic plan. In this arrangement the legislature strictly reserved two of the three fundamental systems of taxation to itself—the income tax, as well as the customs and excise. These State taxes were, by reason of the rapidly increasing financial needs of the British empire, much increased in the eighteenth century, and in the course of the great wars with France were extended in a manner hitherto unheard of. On the other hand, the State abandoned the old land tax system, in order to gain the full force and capacity of expansion of direct taxation for all purposes of a village, town, hundred, district, and provincial organization,\* according to the following points of view:—

That the basis of the household of a community, can only be a permanent and uniform one, independent of the annual changes in persons and property incidental to a shifting population, with which such a small household could not exist;

That on that account the burdens of the local unions should be distributed among all the appurtenances of such a community (fields, buildings, industrial works, mines, etc.), ac-

\* Hand in hand with the temporal local taxation system, in the eighteenth century the church rate was also employed, so long as it was possible, in maintaining the sole ascendancy of the national Church in perfect strictness, to force the dissenters to it, and to uphold the parish as a spiritual and tem-

poral unity. When in later times the church rate, owing to the refusal of the dissenting parishioners, became a subject of dispute and began to fall into decay, the taxation system of the temporal village union was adhered to with the greater tenacity.

according to the capabilities of the object and not according to the income of the subject ;

That to maintain the official staff of such a community the local rate should be raised from the person of the resident occupier, and be annually re-assessed ;

That on that account, and in order to effect an equal distribution of local burdens among the greater and smaller unions, the poor rate of Elizabeth should be uniformly enforced for each and all the burdens of the village, hundred, and county.\*\*

These were the points of view, according to which, from decade to decade, from generation to generation, and from century to century, the legislation, the practice of the courts, and the administration fixed the local taxes, and thus maintained the material bond, which makes the *communitates* suitable elective bodies for the Lower House. The old *vicenetum* remains throughout bound together in the consciousness that all the pecuniary and other performances that were necessary to maintain civil order, poor-relief, communications with neighbouring villages, and the numerous humanitarian calls upon the parochial union—everything, in short, that in the lower strata makes a State of society—should be permanently and uniformly raised from the appurtenances of the community, which are as much the essential basis of the community as its territory is the basis of the State. The more English society was in danger of being dissolved, from its lowest foundations and elements upwards, by changes of abode, freedom of trade, cosmopolitan ideas of commerce, the roving spirit of the rural labouring population, and the increasing splitting up of the villages into various churches and sects, the more tenaciously did the legislation instinctively cling to the system of real taxation, as being the sole bond capable, where society has become revolutionized, of maintaining the cohesion of the constituencies. And in this system men were not led astray by any class interest of society. In particular the English great landowners had to bear the excessive local burden resulting from it (sometimes a local burden of 25, 40, and in certain cases even 100 per cent. of the annual value), which was in

\*\* The question, whether the rates were to be raised from the person of the occupier or from that of the owner, whether they were accordingly to be raised in the towns as house tax or as rent tax, or should be divided between owner and occupier in certain proportions, appears to be a relative question dependent upon the nature of the property and economic conditions and

custom. In England the raising of local taxes from the occupier was rendered necessary by the accumulation of great landed possessions. Where hundreds of houses and innumerable leases belonged to a single non-resident landlord it was impossible to do otherwise than raise the real taxes and rates from the occupier.

a comparatively short time satisfactorily equalized by the sharing of the excessive burdens with greater communities, and by the annually increasing portion which dwelling-houses and manufactories had to bear of the local rates.\*\*\*

II. The *second personal bond of union* of the constituencies is formed by magisterial self-government, that is, the exercise of the higher State functions in the district, hundred, and village unions by honorary offices discharged by the upper classes—service on juries and the smaller offices by the middle classes—supplemented as need required, by certain professional officers learned in the law and by numerous paid clerks and under officials. This system of internal govern-

\*\*\* The experiments in taxation (p. 890 *seq.*) which were made in favour of the landed interest down to the close of the Middle Ages ceased with the period of the Tudors. Their place was taken, under the name of subsidies, by (1) a uniform taxation of objects (land tax); (2) a uniform taxation of subjects (property and income tax, tithes and fifteenths); (3) a uniform tariff of customs, duties, and excise. Under Cromwell new assessments were made, which were retained by the Restoration. In the eighteenth century the old system of voting periodical subsidies passed into that of the tax laws, and the periodical taxes in vogue up to that time, which the State needed year by year, were now also raised by tax laws from year to year without any special vote of Parliament, new taxes being added to them from time to time by law. In this new stage of tax legislation the system of customs and excise was certainly excessively extended in the interest of the ruling class. A new and considerable income tax (in the place of the tithes and fifteenths which had become merged in the land tax) was first imposed as a temporary tax during the great wars with France (1798–1815). These, like the indirect taxes, were entirely refused the communities. On the other hand, parliamentary legislation closed the book of the State land tax, made no more land registrations since 1692, declared the land tax which had fallen into decay to be redeemable (1798), so that it only still continues in a *residuum* of about £1,050,000. The room thus made had now become free for the local rates, which in the year 1803 had increased to £5,848,000, and in the course of the present century had at-

tained the double and the treble of this sum and are still increasing. Soon after the Reform Bill, the intolerable overburdening, which had resulted from the smallness of the townships parcelled out for poor and highway rates, called forth an agitation for the "disburdening of the land," which was, however, pacified by the distribution of the burdens among greater unions, so that in recent times the heavy burden of maintaining the village schools has again fallen upon the local rates. England has been spared a class conflict on the question whether the land does not pay too much and personal property too little. I seldom find in the pages of the reports on the subject any reference at all to such a tax-grinding policy, but only the natural reflection, that in their freedom of acquisition the wealthy classes may, as they think proper, be either landowners or capitalists. The well-founded complaints are only based upon this, that by the dwarfish formation of the poor law unions in those days an intolerable burdening of certain great estates and townships resulted. A critically executed survey of these conditions of taxation is given by the former President of the Poor Law Board, later First Lord of the Admiralty, Mr. G. Goschen, in his Reports and Speeches on Local Taxation (1875). The annual value of the land was in 1868 taken at equal to £143,872,000 (for parochial taxation assessed only at £100,612,000). The total of local taxation burdening it will soon have reached the amount of £20,000,000, whilst in 1803 the whole of the annual value of the land was estimated at £34,864,000 (cf. Gneist, "Self-Government," 1871, secs. 25, 152, 160).

ment of the country is not due to any special predilection, peculiar to English life, for a dilettante government by "laymen," but to the experience that the higher police duties are actually well administered by socially independent men of general education, and according to a freer and surer view of general life, than by an exclusive bureaucracy, and that any deficiency of experience in the routine of duties can be supplied by the numerous clerks and lower attorneys, of whom there are so many in England, and in practise can be more easily made good than can deficiencies in personal character and qualities. The equally important significance of the honorary offices is that, in spite of the principle of the dismissibility of all administrative officers, it secures to the official the full independence of the judicial office; only by the insertion of these elements of judicial independence could that system of administrative justice be formed, which supports the parliamentary government, whilst the prefectorial councillors of a professional bureaucracy cannot hold their ground when confronted with changes of government and the agitation of influential parties. More important than all else is, however, the social side; namely, that this spontaneous activity binds together the disunited strata of society, in that which is common to them all, viz. the administration of justice, the maintenance of civil order, and provision for the poor. Whilst the life of society tends rather to separate than to bind together men in narrower and wider circles, in the interests of possession, acquisition and labour, in creeds and in professions, it is of incalculable value, when the same men meet together in fulfilling common civil and humanitarian duties, and learn to know and to esteem one another in their activity for the common good. This is the side which gives to personal activity within the community a value that cannot be replaced by any other institution in the world. And if in this activity the lower strata of society learn to know the upper classes not only as men who are in the enjoyment of greater gifts of fortune and wealth, but also as men who do more for the good of mankind,—who by the sense of honour, independence of thought, and character that honestly acquired property give to men, administer the magisterial office with justice and with honour,—there results a conciliatory element in view of the disparity of classes, which has in England been created and maintained by the permanent institutions of the country.(1)

(1) This personal importance of self-government has been especially enlarged upon in my "Self-Government" (3rd edit., 1871). This side has been altogether missed in the French municipal system, which has only con-

sidered a representation of tax-payers, and has left the magisterial administration exclusively to the prefects of the departments, districts, and townships; it has, however, been perfectly recognized in the Prussian *Städte-ord-*

III. But the *communitas* attains its full importance for the parliamentary constitution by the *permanent organic blending* of self-government with local taxation, by the personal union of the magisterial and economic self-government, which is also peculiar to the municipal system of Germany. This personal union first creates for the social contrasts of property, business, labour, and creed, a counter organism, quite as durable and effectual, which again binds them together, changing social prejudice into political judgment, and producing that sense of right which enables a nation to govern itself. Above all, it is the management of the whole by the honorary office of the justices of the peace, which preserves a sense of civil order and public spirit. The constant exercise of civil duties educates and accustoms the mind of society in these elective bodies, and engenders, in those that take part in them, the consciousness of a due influence in their sphere, by continually reminding them that they have to exercise this influence by virtue of a calling they have received from the State, and only according to a law that binds them, and not by virtue of their birth or property. The social life of the county and the villages is pervaded and enriched by a right understanding for the State, by a spirit, a faithfulness and a public spirit, which absolutism even in its best shape can only succeed in making a privilege of the bureaucracy.

It is only the transformation and moderation which class contrasts receive from this local self-government, that produces those moderate political parties, which are capable of conducting a parliamentary government after the English fashion. The elections of such a body present a "diagonal" of common aspirations, in which the extreme prejudices and tendencies of the social classes have been already overcome. Thence proceed first of all those fundamental tendencies, which modern times are wont to designate by the terms liberal and conservative, in contrast to the unmitigated purely social extreme parties. From out the daily life of these neighbouring, cohesive, equally responsible self-governing communities, there arises a political consciousness, which unites the natural diversity of opinions and aspirations to a common will. The majority of the elective *communitates* thus receive an essentially characteristic physiognomy, an individual character. This joint and common will of a corporate body cannot be otherwise expressed than by a resolution of the majority, as against which a representation of minorities is altogether absurd.\*

nung of 1808, and in its imitations, especially in the Prussian *Kreisordnung* of 1872 (Gneist, "Preuss. Kreis-

ordnung," Berlin, 1870).

\* The working out of social contrasts with a view to a common con-

Yet all this was not effected in England without a reservation for the urban constituencies. The English towns at present form two groups. About two hundred cities and boroughs in England and Wales send, as special civic constituencies, members to Parliament, as *parliamentary boroughs*; about one half of them were in the course of time incorporated by express charter, and fell accordingly under the following head.

Nearly three hundred towns have, on the other hand, since the close of the Middle Ages received a positive organization, as a rule with mayor and council, as *municipal boroughs*; to these belong also nineteen cities with the more extensive privileges of a County Corporate, which gives them also the right of having their own sheriff, coroner, and a special urban militia.\*\*

This municipal system certainly was and remained an accumulation of anomalies, which only accidentally compensated one another. The old civic constitution of the corporation, limited to the police administration and the old civic property—the burdensome and expensive part of the poor law and highway administration in the hands of the parishes, completely disconnected with it—other parts again of the civic system in the hands of special *commissions* or *trusts*; some of the towns represented in Parliament, brought by charters of incorporation into a formal constitution; others still remaining on the basis of the now decayed, mediæval court leet; part of the incorporated towns represented in Parliament, another

consciousness, and not the sum total of the individual opinions contained therein, gives the *vetum* of the body its importance. The greatest number of intelligent and well-meaning men since James I. voted certainly under the name of the Universities of Oxford and Cambridge, which have nevertheless contributed the strangest figures to the English Parliament. It is much the same with the elections of the great cities. Inasmuch as the internal connection of the elective bodies is the essential point, it was in principle a justifiable arrangement that an equality in the representation of the greater and smaller counties and the greater and smaller boroughs was maintained, so long as a due proportion of the represented classes of society was on the whole provided for.

\*\* The violent mutilation of the municipal constitutions, so far as it originated with James II., was finally rescinded, but the irregularities caused

by former charters of incorporation and local observance remained in principle unchanged. The decisions of the Lower House as to the validity of elections in boroughs remained as before sometimes influenced by party considerations, sometimes void of principle and fluctuating, and a later statute could only instruct the sheriffs always to proceed according to the latest decision of the Lower House. An endeavour was now made with the co-operation of Parliament to meet the numerous local needs of municipal government by local acts, of which we find 11 under William III., 10 under Anne, 15 under George I., 46 under George II., and no less than 400 under George III., by which new and arbitrarily formed administrative bodies, and representations of citizens were again formed. As to the caricatures of a municipal system, which proceeded from this, cf. Gneist, "Self-Government," 1871, sec. 73.

part not; the smallest, quite decayed towns represented like the greatest counties by two members; and finally some places that had now become great towns entirely unrepresented.

Such were the latest visible results of the representations of boroughs, heaped up upon one another without any system, and more than ten times as strongly represented as they should be. The unavoidable consequence was the subordination of the real local interests to the interests of Parliamentary parties, as the struggling parties of Parliament sought their elective influence principally in the small or otherwise normally formed boroughs, which since George III. were hotbeds of systematic bribery and corruption. The greater the number and the smaller the importance of the boroughs became, the more they fell under the dominating influence of the neighbouring large landowners. In many of these boroughs the great noble families have established themselves as securely as in the castles of the Middle Ages. The election statistics of the eighteenth century were shrouded in a not unintentional obscurity. At the end of the century a petition of the "Society of Friends of the People" pledged itself to furnish proof that 200 representatives of towns were elected by constituencies of less than 100 electors, and that altogether 956 members were nominated by 154 patrons—without meeting with any serious refutation. This was still a sort of equalization for a borough representation, ten times as strong as it should be, certainly at the expense of the morality of the small constituencies and the interests of the middle classes, whilst the energy and the influence of the county gentry was again enhanced by these anomalies. But the representation of the boroughs in Parliament always remained the weak point of the great and otherwise harmoniously constituted parliamentary body—the undefended position which the Reform Bills of later times with good reason attacked.\*\*\*

\*\*\* If in spite of all we inquire into the ultimate reasons for the prudent moderation which distinguishes the English parliamentary system from all its imitations, why it has better respected the public rights of the country than the monarchy that preceded it, why the whole change of office of an English Government by party is confined to half a hundred political offices, why with this exception a permanent professional bureaucracy and full in-

tegrity in the administration has been maintained, why the position of the judges, and the possessions and the independence of the national Church have remained untouched by party governments; the reasons are to be sought purely in the spirit of the elective bodies, from which the House of Commons proceeds, in that internal cohesion, which has given these bodies the right will to exercise their political liberty aright.

## CHAPTER LI.

## VII. The Position of the Upper House.

THE Upper House is the necessary supplement to the House of Commons, as being the depository of the existing system of laws, protector of minorities against majorities, and the guardian of the permanent interests of the State against the daily changing interests of society. For this reason a second representation is accorded to the ruling classes by the heads of their noblest families, independent of the changing influences of elections. The number of 166 peers that were existing at the accession of William III. was further increased in the course of the eighteenth century by 34 dukes, 29 marquises, 109 earls, 85 viscounts, and 248 barons. Among the total number of peers (372 at George the Third's accession, —at the present time (1882) as many as 512), the representation of the Established Church by two Archbishops and 24 bishops becomes an ever diminishing minority, a mere complement of the pre-eminently temporal character of the institution, which on the one side gives to the ruling class its highest privileges, and on the other to the political body of the State the requisite stability.\*

Since the eighteenth century the constitutional lawyers of all nations, with scarcely any exceptions worth naming, have arrived at the unanimous opinion that side by side with a popular representation, with its well-known changing majorities, a stable element is absolutely necessary, which, according to the differences in the bases of the State, and according to the nature of the social system ought, either by life members or hereditary members, or by a representation of permanent bodies, in one way or another, to obtain a higher degree of

\* On George the First's accession the Upper House consisted of 22 dukes, two marquises, 64 earls, 10 viscounts, 67 barons, 16 Scotch peers; of these peerages there were only 52 existing at the death of George IV. It was by the numerous creations of peers under George III. that the consciousness of the internal unity of the Government with the enfranchised *commune* and

the ruling class was completed and thus that unity of action was produced in the parliamentary body which England has neither before nor afterwards possessed to such a degree. A foolish and presumptuous attempt of the nobility to limit the royal prerogative appointing peers to a fixed number, was soon understood aright as to all its consequences, and rejected by the Lower House (1719).



permanence in order to be a support to the existing political and social system.\*\* Unfortunately these well-founded theories, as a rule, lose their influence upon public opinion just at the time when modern society has the greatest need of this moderating influence.

In the struggles between the Crown and the estates, England has empirically attained to that formation which in the eighteenth century appeared the natural and proper one. In its rise the Upper House had come into the world as a council of State, strengthened by the power of landed property. Into the permanent council the greatest feudatories and prelates had entered, representing the great landed interests, yet not merely property, but including those spiritual magnates who conducted the actual government of the Church, as well as those temporal magnates who were both ready and able to discharge the *ardua negotia regni* in common with the highest servants of the Crown, and who also both in political burdens and taxation everywhere stood at the head of the people. The ability of this aristocracy, acting in the very reverse manner to the old French Parliament, pushed back the merely bureaucratic element and subordinated the royal *justiciarii* and mere professional officials as assistants to the main body. The spiritual and temporal peerage, in the periodical sessions of the royal council, tacitly became a permanent body and an essential factor of the legislature, and also the highest tribunal of the judicial system. Its individual prominent members form in the eighteenth century the majority of the highest servants of the Crown, who under the name of the Privy Council carry on the actual Government of the State.

Where in this manner both Upper and Lower House together discharge the real business of the State, no theoretical proofs are needed of the necessity of the system of two chambers, which is of itself sufficiently apparent in the daily action of Parliament.

Without the Upper House the legislature would immediately lose its footing, or rather would not exist at all; the resolutions of the Lower House (in consequence of its exclusive financial power and its decisive influence upon changes of ministry) would, like the daily resolutions of a convention, take the place of the legislature, and the difference between the statutes and the daily resolutions of the majority would

\*\* The petty state, in which the elements for the constitution of a first chamber are wanting, thereby shows itself to be a *civitas imperfecta*. In reality such states exist only in subordi-

nation to a greater political whole whether this be called a federation or a confederate state, and are only in this conjunction capable of fulfilling the duties of a "state."

immediately cause legislation to become an empty form and a mere name.

Without an Upper House a Government according to law would at once cease, as every resolution of the majority in the Lower House would at any given moment be able even to repeal, suspend, or do away with the existing laws. The protection of the rights of individuals by the tribunals would at once be abolished, as the higher legislative power of the resolutions of the majority could at any given moment set aside both the judicial tribunals, their officers, and their judgments.

This is the hurried process through which all constitutions framed according to the ideals of pure democracy and according to the doctrinaire systems of a sovereignty of the people pass forthwith into a dictatorship, and even into an unbounded absolutism, which tears down every barrier of the executive. England, under Cromwell's short reign, had just enough experience of the one-chamber system to prevent a recurrence to it. This popular opinion was sure to become more and more firmly established, the more that the rapid change of parliamentary majorities and ministries in the eighteenth century showed the necessity of a firm support for the legal and administrative system—a support which was no longer to be found in the Crown.\*\*\*

At the same time, in the course of centuries, England practically learnt that a political body which was to hold its own side by side with the mighty power of the House of Commons must be rooted like the *communitates*, not only in property, but also in the lowest foundations of the structural edifice of the State. In fact every *communitas* contains those elements which, when concentrated in Parliament, form the Upper House. The peers, who ordinarily stood as lord-lieutenants and *custodes rotulorum* at the head of the actual county government, of the administration and the command of the militia, which was in the eighteenth century still in an efficient state, continue the idea of a leading position also in their combination to an Upper House. The principle of the royal appointment of the magistrature, which prevails in the province of the military, judicial, and police power, also continues the principle of appointment into the Upper House.†

\*\*\* It is characteristic of the practical views of life which arise from real labour in the State, even at the present day, that even the modern school of political economy in England, which would fain build up the State merely of interests—in the widest imaginable extent separating itself from the notion and the necessity of a right

in the State—that even John Stuart Mill advocates a system of two chambers as being a necessity. The idea of the sovereignty of the people, however, changes the order of precedence. The first chamber must for the future be called the "second chamber."

† In this question also the practical views even of English radicalism re-

The customary self-government of the counties by hereditary landowners leads further to the recognition of an hereditary peerage, just as in an absolute bureaucratic State the nature of the office leads to the higher officials being appointed for life and to their association into a permanent official body. The cohesion of the individual with the whole, the uniform co-operation of the elements according to a fundamental system, gives also the English Upper House a footing in the English political and social system.

The noble Upper House too, in the same way as the Lower House, represents an organic combination of property and office—not that of an ancient and now fictitious office, continued by mere title of nobility (like the titles of nobility on the Continent), but of a living, continuous activity in the highest business of government and in the daily labours of local administration, in actual service on behalf of the commonwealth, with the complete responsibility of a public office. Just as little is it the representation of a privileged landed interest which has disappeared with the now perfectly unmeaning feudal bond in England, but of all property paying taxes and fulfilling personal duties towards the State. The position of the peers in legislation and in taxation corresponds to their quality as the greatest tax-payers, like that of the gentry in the county. In this cohesion the position of the Upper House was, in the eighteenth century, securely established.††

cognize the necessity of *appointment* to the higher offices of authority. The estrangement of society upon the Continent from personal activity in the State could certainly not perceive the necessity of the principle of appointment for the first chamber in the monarchical State. From the point of view of society these chambers must also be elected, like all elements of self-government, beginning from the lowest to the highest. The necessity of creating the military, judicial, and police authorities by appointment, by a higher authority, and not by election, only becomes intelligible by an habitual co-operation in military and judicial duties and in the police control.

†† The strong movement in the ranks of the peerage and the new creations repeated from year to year prove to us that their honours are acquired honours, as in the Middle Ages. Just as the residences of the gentry

in the counties are where we expect to find a great tax-payer and a justice of the peace, and as these combined together form the centre of the local and provincial government, so do they appear concentrated in the House of Lords. And this relation continues, at all events as an average rule, down to the nineteenth century. In the lists of 1855 I have counted as belonging to the English Upper House 61 lords who are lord-lieutenants at the head of a county government, 116 lords who are officers of the militia and on the militia commissions, 58 in the active army, 67 active or former ministers or under-secretaries of State, and 108 former members of the Lower House, etc. The type of the lord as a mere private gentleman, which was in the eighteenth century the uninfluential exception, is unfortunately to-day more and more on the increase.

## CHAPTER LII.

## VIII. The Established Church as a Link in the System of Parliamentary Government.

WITH great difficulty and very gradually the Established Church in the course of the eighteenth century made its peace with the reformed parliamentary State. It is nothing more than the truth if we recognize that the Church in the conflicts of the Parliament with the Stuarts ran a great risk of becoming an instrument in the hands of changing parliamentary parties. Therefore it was that, with her theories of absolute power, she so energetically supported the *jure divino* monarchy of James I. and his successors. The antagonism of the sects opposed to her was in later times silenced by the rigorous prohibitory laws of the Restoration. From that time on, the Anglican clergy had begun, both in their writings and in their sermons, to vie in dangerous competition with the Roman Catholic clergy for the favour of the two royal brothers, each religion putting itself forward as the true and sole support of the throne and of social order. The clergy was unable again to divest itself of this political character. Sometimes in favour, and sometimes in opposition, they found themselves drawn into the whirl of parliamentary parties during the last decades of the Stuart dynasty. The pulpit had become a chair of political teaching, and all the more effectively seeing that the orator found no contradiction, and that the press was still under censorship. Instead of devoting themselves to the cure of souls and to their vocation as teachers, the clergy and their two universities found a favourite topic in the burning questions and controversies of the day, in the denunciation and refutation of opinions displeasing to themselves. In their zeal for the *jure divino* monarchy, however, they were so often injured by the Stuarts, and at last so grossly deceived by James II., that they finally joined the cause of the party of resistance, and even by their own resistance gave the signal for the outbreak of the "glorious revolution."

By the second revolution and the change of dynasty, however, the danger of their subjection to a variable system of

rule by parliamentary parties became more threatening than before. In unconquerable dislike to such a state of things the clergy very soon returned to the colours of the Stuarts. The political secession of the "non jurors" continued for a generation in open antagonistic opposition to the reigning dynasty, and traces are even perceptible down to the commencement of this century. But as the Whig ministries appointed Whig bishops, the estrangement between Church and State was followed by an estrangement between the higher and the lower clergy, and a further consequence was a bitter feud between the doctrines of the *High Church* and those of the *Low Church*.

There lay, however, in the ecclesiastical system a contrast to the parliamentary system, which makes the two organisms appear like opposite poles. Benefices, chapters, universities, and colleges cannot be governed like temporal *communitates*, nor the office of instructor administered like that of a police magistrate. All applications of a parliamentary constitution to the Church only result in a predominance of extreme tendencies, a bitter party strife (which, being a struggle for creeds, cannot be allayed by resolutions of a parliamentary majority), and above all in constant conflicts with the temporal Parliaments. The spirit and the objects of Church doctrine and the cure of souls necessitates, very differently from a parliamentary constitution based upon self-government and taxation, a standing and perpetual ecclesiastical government with complete supervisory powers, perfectly distinct from all temporal party interests. An application of social and parliamentary formations has accordingly at all times only been practicable when subordinated to a strong ecclesiastical government, and then only in questions of ritual and property.\* The ruling class in England had before its eyes the vivid picture of the dangers of an ecclesiastical parliamentarism, not only from recollections of the disastrous system of the Presbyterian Churches under Cromwell, but still more vividly by the development of the Scotch Church, and we cannot but admire the circumspection by which, in the following manner, a *modus vivendi* was arrived at with the ecclesiastical system.

\* The synodal constitution of the Convocations under the Tudors was fairly well established, but only under the condition (1) of very large rights of appointment by the Crown for the members of the general synod, and of controlling powers exercisable by the royal commissioner; (2) of a correct exercise of the royal prerogative in the spirit of Christian tolerance; (3) and

of the subordination of the general synod to a royal high commission, as the highest court of the ecclesiastical state (Chap. xlii.). The second condition had ceased with the Stuarts, the third since the Restoration, and all conditions in the eighteenth century, after the non-reinstating of a high commission, had become a leading principle of the constitution.

1. By recognition of the hierarchy of the Anglican Church according to the Episcopal system, from the archbishop's office down to the parson's; by the retention of the bishops' seats in the Upper House; by avoiding any interference with the internal affairs of the Church; by incorporating the jurisdiction of "the King in council" as a court of supreme instance in a Court of Delegates, which in later times obtained the name of a permanent division of the Privy Council. The periodical general synods of the clergy in their Convocations, which were seen to be incorrigible depositaries of clerical caste-exclusiveness, were in the long run found to be incompatible with peace in the Church, and after the year 1717, the pacificatory course was adopted of suspending their activity by summoning them in the usual manner, and, after opening the sitting by a royal commission, immediately adjourning it on account of want of business (a proceeding which lasted until the middle of the present century). The direct antagonism between spiritual and temporal parliaments was thus removed. A link remained above in the persons of the bishops sitting in the Upper House, below, in the constitution of the parish. The members of the ecclesiastical system that lay between these two extremes had to be reconciled to the new order of things by the following further concessions:—

2. The *Church property* is protected and preserved by Parliament more conscientiously than in any other century; and under Queen Anne increased by a great endowment. This property represents even to the present day the income of a continental kingdom (according to the assessment of 1851, estimated at £5,000,000 annual income, and landed estates of 1,500,000 acres), as was deemed necessary in England to maintain the dignity of the Church side by side with a wealthy ruling class.

3. The *ecclesiastical benefices* by the legal fiction of a "*corporation sole*" are preserved intact, and serve, as did the incorporation of the universities, to keep the influence of parliamentary parties far removed from the ecclesiastical offices. In another direction the patronage of these offices is distributed amongst the King, the spiritual and temporal lords, the landed gentry, the chapters, the universities, and other bodies, almost corresponding to the present influence of the ruling class.

4. The Established Church still retains a considerable *ecclesiastical jurisdiction*, subject indeed to a State tribunal as a court of supreme instance, but yet with sundry magisterial rights extending even over dissenters.

5. *Conformity* to the Established Church remains the condition of entering Parliament and taking office in the State.

The subtle system of the Test Acts (25 Charles II. c. 2) has extended this bond, subsisting between the Church and the dominant class, which had existed for nearly a century and a half, to everything upon which political influence in the State depends, i.e. to those holding any office, civil or military, or receiving pay, salary, fee, or wages, by patent or grant, etc. On the other hand the ecclesiastical possessions throughout are subject to the burdens of the parish, the clergy are active members of the vestry, an important element of the commissions of the peace, and become gradually more and more blended together with the dominant class in parliamentary government.\*\*

The ideal of a *united Church in a united State* was thus again attained. In practice the condition of things here was similar to that existing in continental States, in which, according to the *one-church* system, either the Roman, the Lutheran, the Reformed, or the Greek Church, was so bound up with the institutions of the State, with the family rights, the education, and the customs of the nation, as to represent an essential element of the national State. A feeling of the upper classes (we may call it tolerance or indifference), characterizes the eighteenth century in England also, practically almost invali-

\*\* Cf. as to the constitution of the State Church, Gneist, "Das Englische Verwaltungsrecht," vol. ii. chap. viii. The whole displays a picture of an intimate relation of interests between Church and State, and between the clergy and the dominant class, in which the Church preserves the essence of her constitution and the independence of her ministering office, under peculiar conditions. The dominant class has on its part so completely understood the full importance of this connection for its position among the lower classes of society, that the motto "Church and King" became and remained the watchword of the Tory party. The strong side of this system was the political side, in so far as by this means a main foundation was gained for the possibility of a parliamentary party government. All this again was certainly in some measure at the expense of ecclesiastical efficiency in teaching and the cure of souls, and had a certain weakening effect upon the education of the people and upon the intellectual life of the nation generally. After the Church had been fully secured in her corporate independence, there again supervened, as in former epochs, a slackness in the

spiritual calling. No sect was any longer a serious rival; the Catholics were kept down under penal laws. The highly placed prelates and rectors thus lost in many instances their interest in the cure of souls. Even, under Queen Anne, it was calculated that the larger portion of the livings were occupied by scantily endowed vicars and curates with an average income of £50. In many places the population gradually increased far beyond the limits of the parish; but instead of forming new parishes with all the rich resources at the disposal of the Church, these people were abandoned to neglect and Methodism, which now separates itself off in a great degree from the Church, which had become too aristocratic. This is the natural cause of the growth of dissent of the eighteenth century, which was the outcome of feeling, whilst the older sects, which had arisen in the struggle against the State Church of the Stuarts, take up a distinct and separate position, almost devoid of influence. It was not until the nineteenth century that the Established Church endeavoured to repair these gross neglects.

dating the penal laws passed against Catholics and dissenters, allowing the dissenters by annually repeated acts of indemnity (since 1727) to hold office and exercise political rights, and according all creeds in the main the legal equality of individuals in civil matters, without on that account abandoning the position of the Established Church. She remains the Church of the King and of Parliament, the Church in all decrees and acts of the State, the Church, which in exercise of her jurisdiction, her right to tithes, her church rates, and her church marriage (after the Marriage Act of 1753), treats other creeds as non-existent. For the dominant class, conformity to the Established Church is the condition precedent of the constitution—for the King in council as for the King in Parliament—recognized by Whigs and Tories alike.

This welding of the Established Church into the parliamentary state was the last decisive step towards establishing the cohesion and internal harmony, with which an even pulse returns into the life of the nation. And herewith the clergy at last ceases to be an agitating element in the struggle for power and social interests, and to vaunt itself as being the true prop of the throne and order; but it finds its conservative calling again in teaching and the cure of souls, in representing the Christian moral law, as it is incorporated in the Anglican Church, homogeneous in itself, and intelligible to the minds of the majority of the nation.\*\*\*

In the dignity of their vocation, in political clear-sightedness, in patriotism, and in respect for civil society, there was probably no clergy in Europe that could equal the Anglican clergy, and if their activity was only too intimately bound up with the position of the dominant class, yet it was and remained a high vocation in its sphere, and of great and important influence upon the present legal order of the State, which thus stood on a secure foundation in a universally recognized doctrine of the Christian moral law. This position of the State Church was the latest development in the organism of parliamentary constitution, but not the last in point of effectiveness.

\*\*\* This recognition of the equality of the individual believers of other confessions is something entirely different from the system of the *parity of two Churches*, which would be incompatible with the English parliamentary system. The Presbyterian Church, it is true, was the State Church for Scotland, yet only as a provincial institution, and as being a kindred church system. As to how a *two-church* system

must be organised in the same state (as was the case in Germany after the peace of Westphalia by the union of Catholic and Evangelical territories into a confederation of states), public opinion in England appears to have but little clear idea, although England, since the re-establishment of Catholic bishoprics in the country (1850) is brought face to face with the same problem as Germany.



## CHAPTER LIII.

## IX. The Relations of the Crown to Parliament—The King in Council and the King in Parliament.

UPON the thus consolidated basis of the hereditary succession of self-government, viz. the ruling class in their Upper and Lower House (Chaps. xlv.—lii.), there now becomes developed a new position of the royal council as regards Parliament, which for more than a hundred years, under the name of a "parliamentary government," has as an ideal of a monarchical constitutional government, stood before the nations of the civilized world as a goal to be attained.

The Revolution had preserved the royal office, not as a monarchy of divine appointment, but as an hereditary monarchy of human institution, with a parliamentary title, to be compared with the accession of Henry the Seventh. The English State remained accordingly a monarchy, and indeed a constitutional monarchy with a double organization; as *King in Parliament* and as *King in council*, that is, the King, in exercise of the executive power, is bound either to the consent of the one or to the assistance of the counter-signature of the other. The old powers of the Crown still continue, though from time to time enlarged, limited, and modified by the legislature, that is, by "the King in Parliament." These powers have become divided among a number of constitutional departments (courts, commissions, and boards), all at length converging in the "King in council," the King as head of the now so-called executive power. The events of 1688, however, have produced changes in the relation of these powers, which also react upon the form of the central administration.

I. The Privy Council is still the constitutional seat of the Government, but with essential limitations of functions as also of persons.

The supplementary power of the King in council to issue ordinances still continues; but as the sovereign rights are to the widest extent fixed by statute, and become continuously more and more fixed, the ordinances are restricted more and

more to colonial and foreign affairs, to executory ordinances and instructions to officials.

The power of the council to decree *extraordinary measures* of temporary government has not been expressly abolished; but, since all power of dispensing with and suspending parliamentary statutes has been taken away, the more important measures pass to Parliament in the form of private bills, etc.

The jurisdiction of the council in civil and criminal causes disappeared with the Star Chamber; all that has remained of it is only a right of preliminary inquiry. To this were added the following further changes:—

The permanency of the judges' office was made a rule by 18 William III. cap. 2;

The whole police administration, the superior jurisdiction of the local government, the militia, and everything that is liable to abuse of power from above, was "de-centralized," by an endless series of statutes, and placed under a system of administrative justice;

The Church has attained her independence of the ministry in power;

The Upper House finally, has become so consolidated, as to enable it to take again, as in the fifteenth century, the position of an independent council of the realm.

The practical centre of gravity in the governmental system now lies essentially in the deliberation of the King, touching the summoning and dissolution of Parliament, and the bills to be laid before it. The present council in its deliberations deals with measures of foreign and colonial policy, with the introduction of new laws, with temporary measures, and with the re-appointment to vacant offices; that is, with business for which the ceremonious sittings of a numerous body appear actually neither necessary nor suitable. All functions, for which the permanence and the divisions of a council of the realm are essential, are (as was already partly the case in the preceding period) actually withdrawn from the council.

And accordingly the remaining business of the council passed to a council of ministers formed of five, seven, or more principal members of the council as "His Majesty's present government" (cabinet). This method of government, which proceeded from the cabinets of James I. and Charles I., from the cabinets or cabals under Charles II. and James II., proved itself at the commencement of this period to be the only possible form, paying as it did due regard to the predominating party in Parliament. Even that great man William III. was unable to form a coalition government of Whigs and Tories; in the years 1793-96 the dissenting elements silently retired, until an homogeneous Whig cabinet

remained. William III. last presided at real deliberations of a council. Men became convinced by practical experience that the new bills and measures to which the council was now confined, could only be laid before Parliament by a united government entertaining the principles it advocated. For this reason no serious attempt was made to return to the old course of business in full sittings of the whole council.\* But as nothing has been altered by law in the cases where, according to constitution or law, an *order in council* is requisite, a nominal royal council is held, to which, besides the ministers *pro forma*, some of the members of the council, who are of the same mind as the ministry for the time being, are invited. The Privy Council exists now only as a ceremonious sitting of the ministry for the formal ratification and publication of such measures as constitutionally must proceed from the "King in Council."

To this form of State government is attached the predominating influence of Parliament over its members and their policy.

II. To the King in Parliament, therefore, all those powers are transferred which have been lost by the King in council; that is to say, the ministers of the Crown, for the time being, now need the consent of Parliament to a long series of cases which were in former times discharged, as a matter of course, in the council.

This new method of government in England in no way rests upon the normal powers of Parliament, its share in the legislation, its voting of supplies, and its right of controlling the Government as such had been historically developed since the fourteenth century, and fixed by numerous precedents. The dynasties of the Tudors and the Stuarts had nevertheless with this Parliament carried on a monarchical *regime*, and even after the numerous other limitations imposed under Charles I. and Charles II., a conscientious monarch might have found in the constitution sufficient scope for the exercise of his royal power. It was the new position of the Crown after the Declaration of Rights that perfectly altered the position of the King in council, and the King in Parliament.

The material point lies in the unalterable truth that every

\* The Act of Settlement attempted once more to restore the original relation by providing, that for the future all matters touching the government of the realm, which would ordinarily be dealt with in the Privy Council according to the laws and customs of the realm, should be there so dealt with and signed by such members of the

council as had deliberated upon and consented to them. But this clause was repealed without ever being carried into effect. Men were convinced that it was impracticable. As to the question of the constitutionality of the new mode of business, cf. note at the end of this chapter.

political constitution must leave loopholes, which may be described as extraordinary powers, dictatorial powers, latent powers, or the like, but which ever arise anew from the relations of State and society. No human wisdom and foresight can exhaustively circumscribe supreme power in the State by laws or constitutional rules, since the unforeseen needs, and even urgent requirements of society, in every short period demand new measures, for which no sufficient rule has as yet been discovered. In the republic, as in the monarchy, this dictatorial power must lie on the one side or the other, and the element of power that is taken from the one side must ever be given to the other. Nations which have grown up under a monarchical constitution, and have preserved an intimate relation to their monarchy, reserve these powers to the sovereign in the well-grounded feeling that they rest more securely in an institution which in every personal and family interest is identical with the permanent welfare and prosperity of the country. The English nation, too, has adhered to this monarchical tradition up to the furthest possible limits. Even after very evil experiences in every former century (pp. 451-453) the circle of the latent powers was carefully, hesitatingly, and almost timidly drawn somewhat closer by the legal definition of certain points. It was the unexampled breach of faith, and perversity of a dynasty throughout three successive generations that made the nation waver in this belief, and brought about that change which, under the name of the "glorious revolution," deprived the Crown of every tittle of extraordinary power, because that power had been abused in the most flagrant manner. Every single sentence of the Declaration of Rights was only too much justified by preceding events; but this whole chain of negations since the days of Charles I. leads to a materially altered system of government. The total result of these negations is this, that in every such loophole the powers of the Crown have been expressly taken away, and any attempt made to exercise such appears as an unequivocal case for an impeachment of ministers, and that accordingly every remnant of dictatorial power, which can have any practical importance in a State system, is from that time forth denied to the King.\*\*

\*\* In this decisive point of the so-called parliamentarism there are no "general constitutional truths," but the English nation has even here proceeded slowly and prudently by the light of experiences that are peculiar to England. The Petition of Right, the abolition of the Star Chamber, and

the Bill of Rights only lop off single and grossly abused prerogatives. The unconscientious employment of State resources under Charles II. first of all caused that rigorous framing of the clause of application, by which the State government, not only in new, but also in old expenditure (so far as such

Although according to the doctrines of democracy the powers that had thus been taken away ought to have benefited popular liberty, the result was in reality otherwise. Like "the sovereignty of the people" itself, the powers which were taken away from the crown fall into the hands of the dominant class of society, that is, in England, to the now fully developed ruling class in its perfected parliamentary organization. But as the needs of the nation continuously grew out of the existing legislation, as the State, year by year, needed new and extraordinary powers, there was nothing left except that the actual government by the King in council should return to the King in Parliament, return so as year by year to be in a position to cause the necessary means and powers to be voted by Parliament, and thus to enter into a continual confidential relationship to Parliament, that is, into a constant dependence upon it.

But in the eighteenth century there met together a series of circumstances which increased to the utmost extent this dependence of the Government upon the intentions of Parliament. Of these the mention of the following will suffice:—

Whilst the existence of a standing army was dependent on all its needs of resources and legal conditions upon the annual, perfectly free consent of Parliament, no king of England could any longer dispense with this military force, whether for retaining the hold over Ireland, or for maintaining the position of the country in Europe, or yet that of the empire which had spread itself throughout every quarter of the world.

Further, the determination by statute of the whole of the internal administrative law which had gradually increased in

expenditure has not been provided by law), is subjected to the control of the Lower House. The destructive plans of James II. necessitated the annual sanctioning of the standing army by a mutiny bill. The serious abuses of the administration at last caused the boundary between legislation and administration to be drawn in this way, that everything partaking of the character of an incident money bill, or an encroachment upon property, or an exception from the common law falls within the province of private and local bills, and thus into the sphere of Parliament. But as finally here was not one of the royal rights that had not been abused by the Stuarts, those laws took away the whole of the movable part of the powers of Government which still lay

in the King in council. It was only the experiences of three such generations that left behind the conviction that a party government proceeding from the ranks of the ruling class in this country offered more guarantee for a strong and just rule, and less danger to liberty than the old method of government by "King in council." The main point did not consist in formal institutions (which can readily be imitated) but in dynamic forces in the life of the nation. When nations cease to believe in dynasties capable of governing them, disbelief in classes, parties, and party men, capable of doing so, ensues. Whilst all monarchical forms and notions were retained, this belief moved the centre of the State from the council to the House of Commons.

an unusual degree, called for new statutes from year to year, and rendered private and local acts necessary for the smallest change in the administrative rules—acts for which the consent of Parliament was requisite, whilst under the normal constitution the ordaining power of the Government, the grant of corporative rights, etc., had sufficed for the current needs.

And if, further, the normal right of the Parliaments to vote taxes was in itself compatible with the maintenance of the royal prerogative, the Continental wars of England, and later the American war, and still more the gigantic struggle with the French Revolution, demanded such unheard-of resources and loans for the State, that even in the former State of the constitution, the monarchy, *pro tempore*, would have come into an unusual state of dependence upon the tax-voting Lower House.

With an empire in such a critical state, it was only too soon perceptible that no royal council was any longer capable of conducting the business of government even for a single year if in antagonism with the Parliament; the resulting—

III. *Relation of the Cabinet to the Parliament* appears for these reasons to be practically necessary as a continuous understanding between the Government for the time being and the “supreme council” of the King in Parliament, which latter from its very nature, could only take an informal confidential shape, so far as the initiative of Government measures was concerned.

This new relation was necessitated by the now unavoidable dependence of every administration upon Parliament, especially in financial matters. Dependence upon Parliament, however, means dependence upon the majority in the Houses, that is, upon the parties for the time being predominating in it.

The more difficult it was to carry through new laws and measures in the great representative body of the realm, the more necessary did it become to undertake the task of carrying them through only by the agency of compact parties, under the advice and co-operation of their most able leaders. In spite of the counter-endeavours of the Crown, the system of party government accordingly came more and more into vogue, and in the continual fresh and more critical situations, there remained at last no choice but to commit the conduct of the affairs of State immediately to the leaders of the most strongly organized party.

The principal danger that attended such party governments in former generations was removed by the present form of administrative law; party government was not developed until the whole of the internal government of the country had been rendered independent of the principles of the

dominant party. A Whig and a Tory ministry meant under these conditions only new schemes of bills, new financial measures, and a new line of foreign policy ; whilst the judicial, police, financial, military, and ecclesiastical government kept on its established customary course.

Thus, after a century, the place of the "confidential men" in the cabinets of the Stuarts, was taken by the "confidential men" of Parliament in the ministry (the cabinet in the modern sense). In the first generation of the period these were almost entirely nobles of the Upper House, because (in consequence of the Revolution) the dominating influence of great noble families preponderated in the Lower House also. But later, with the increasing competition of the principal debaters in the Lower House, the ruling class upon its broader basis began to be more independent in the money-voting body (as was the case at the time of the Restoration), yet still decisively influenced by old and powerful family connections, such as are generally formed of a fixed and secure class-predominance.

In consequence of the abnormally increased pecuniary needs of the country under George III. the central power in the State had unmistakably fallen into the Lower House, and for a century past in England the only fear has been not of an abuse of the executive power as against the majority, but of an abuse of the executive power by the majority. The Parliament, and especially the House of Commons, instead of controlling the government of the State, and calling ministers to account, has, in an increasing degree, itself become the ruling body. Its majority no longer merely controls the central government, but even designates the rulers themselves. The legal responsibility retires before a "political" responsibility, that is, before a system of change of ministry dependent on the relations of parties in the Lower House.\*\*\*

The rapid alternation of these party ministries is not owing to a general "constitutional" principle, but once again to the peculiar position of the British empire. There have been, since the commencement of the parliamentary method of government, only a few epochs, in which a permanent policy has been clearly and fixedly laid down for a government: the epoch of the consolidation of party government under the

\*\*\* Herein also the question is one of a change in the relations of power. In the transition to the new method of government impeachments were brought in the first generation after the revolution against the highest servants of the Crown in fifteen cases, but since that time only in a few

isolated instances ; for since that time, owing to the change in the position of the ministry, a direct abuse of the executive power was almost impossible, and the temptation to such abuse was, in face of a predominating majority in Parliament, very small.

House of Hanover (Walpole's ministry), and the struggle against the French revolution and the Napoleonic hegemony (Pitt's ministry). But as a rule the position of the British empire throughout the world in its great changes of political and commercial relations to foreign countries, and to the colonies, as well as the very heterogeneous composition of the elements of the empire, necessitated such a frequent change of measures, that the laboriously settled programmes of party leaders and parties could not suffice for the new position of affairs. A short continuance of the ministries in power was accordingly the rule even in the eighteenth century. At every fresh change, however, the experience was repeated that the necessary unity of action could only be attained if the ministry in office was composed of men who were agreed in principle as to the chief measures to be adopted by the ministry, and who on these points already commanded, or had the means to command, a majority in both Houses.

In no one of these stages of development did the new method of government depend upon law, but everywhere upon a tacit understanding between the leading statesmen and the opposition, that is, upon the acknowledgment that a government of Great Britain by both Houses of Parliament could only be carried on upon these lines.

NOTE TO CHAPTER LIII.—Whether government by a cabinet is constitutional or unconstitutional has been the subject of political controversies. A careful examination of the question is to be found in Hallam, "Const. Hist.," iii. c. xv. It is true that no English law recognizes a cabinet as a constitutional body, that the members, as members of such cabinet, have no legal rights or duties whatsoever, but solely as members of the Privy Council. The existence of a cabinet is declared by no official act, and its members are not made known to the public, to the authorities in the State, or to Parliament. Blackstone and De Lolme, in their treatises, do not even mention the name "cabinet." It is also true, that the responsibility of the ministers is in some measure relieved by the formlessness of this council of ministers, of whose proceedings no official record is wont to be kept. A legal rule, as to what members, how many members, and with what forms are to be summoned to the council, had never existed, and from the nature of the case could not well be prescribed for a Privy Council of the King. The gradations of the signet, the privy seal,

and the great seal necessitate that a person can never be wanting to bear the political responsibility. From the nature of the case the present form of transaction between a ministry and the majorities of two Houses of Parliament as to the initiative in government measures could be as little fixed by law as the forms of negotiation with foreign powers as to alliances and treaties of peace. This form of government would certainly be liable to the severest censures if the exercise of the existing public law (as on the Continent) were dependent in any manner upon such irresponsible meetings of party men. But the entirely different position of the administrative law gives to the question for England a totally different aspect from that for a ministry of the continental states. In spite of the cabinet the government remains a government by law, protected against the danger of a party administration. William the Third's resistance at first to the formation of party ministries was very conceivably due to the feelings and the traditions of the monarchy. But he himself in the course of time became convinced that the initiative of new measures in this State could only



proceed from party ministries essentially united in their intentions, and with a united scheme of action. He tacitly permitted that only active members and a few other members of their confidence should be summoned *pro forma* to the sittings of the Privy Council, and in like manner the opposition conceded the point. Since that time the practice has been observed which silently excluded the non-confidential members from the deliberations of the council. Once more, at the deathbed of Queen Anne, was the old constitution in some measure revived. Bolingbroke and his adherents in the cabinet had already resolved upon the succession of the Stuarts, when the Dukes of Argyll and Somerset suddenly made their appearance in the council chamber, took their places, and declared that in view of the dangerous state of the Queen, although not specially summoned, they offered their assistance. They proposed that the royal physicians be heard, upon whose report it was resolved at once to appoint to the office of Lord of the

Treasury, and to propose to her Majesty the Duke of Shrewsbury in that capacity. Here was again an open place left for the latent powers of the King in council. On George the First's accession the Privy Council was dissolved, and a new one formed of thirty-three members; but it was again resolved that only eight members should belong to the cabinet (Nottingham, Sunderland, Somers, Halifax, Townshend, Stanhope, the Lord Chancellor, and Marlborough). Since then the number of the nominal members of the council has steadily increased by members of former ministries and the honorary Privy Councillors being habitually continued in the list, and also re-confirmed after the accession of a new sovereign, so that at the present day the list contains more than two hundred persons, among whom a corporate discharge of business would be practically impossible. As to the functions of the Privy Council as they are now, and its divisions, cf. Gneist, "Englisches Verwaltungsrecht," vol. ii. pp. 726-761.

## CHAPTER LIV.

### The Dissolution of the Great Offices—The Transition to the Modern Ministerial System.

A FURTHER consequence of the transformation of the Privy Council into a movable cabinet was the slowly but steadily progressing absorption of the historical great offices into the *modern system of a ministerial administration*, which becomes more and more bureaucratic in its character, and which, besides the minister, generally receives from the Upper or the Lower House one or two members of Parliament as representatives of the department.

The cabinet was at first formed almost exclusively of members of high nobility. The predominating regard paid to the Upper House was not only rendered requisite by the necessity of its consent to every important measure, but also in an even greater degree by the increased influence of the great families during the revolutionary period, families, themselves the heads

of the ruling class, who by their mutual connections and local influence in the county and borough towns, represented the most compact power in the State. Gradually, however, the necessary consideration due to the body of the Lower House asserted itself, and Walpole, who was at first only appointed paymaster-general, obtained after 1721 even the leadership of the cabinet. From that time forth it became the custom to give certain principal debaters a seat in the cabinet, and now a system of the distribution of the offices was formed generally on the following lines:—

The *court offices* are still engrossed by the heads of noble families, or their relations; without any direct share, indeed, in the conduct of business, but with a high honorary rank, considerable salaries, and an assured influence at court.

The *great offices of State* always fall to a great extent to the noble members of the dominant party, who have also influence in Parliament, special regard being paid to the party relations of the Lower House; for this reason, in the eighteenth century, a considerable number of ministerial offices are also given to members of the Lower House, who do not belong to the peerage.

A change of ministry is followed, according to party usage, by changes in the representative court offices, in the under secretaryships, and in some subordinate offices (altogether about half a hundred), whilst in the permanent service, only those offices which become vacant in the course of the period of the administration fall to the patronage of the ministry and its friends.\*

The arrangement in detail was carried out according to a gradually established practice by the leader of the party, authorized by the Crown, due regard being naturally paid to the merits of rising members; firstly, to merits in parliamentary debate, and secondarily, also to merits in administration. Since the share of the members of the Lower House has increased, a *homo novus* occurs now and then among the leaders of the party. In order, however, to give greater elasticity and solidarity to the cabinet, an important change was seen to be necessary—viz. the dissolution of the old great offices;—which necessitates once more a reference to the offices of the Privy Council in its old organization.

\* The formation of the ministerial department is only touched on by Blackstone and his commentators, with relation to the statutes passed with reference to it, which give no picture of the true administration. The central administration was even in the eighteenth century exceedingly complicated. A number of old and com-

paratively unnecessary offices with high salaries were retained and various new ones created, to draw the members of the Upper and Lower House into the temporary administration and into its interests. To characterize the method of this central administration I add in the following notes certain dates from the middle of the period (1755).

1. To the Lord Chancellor have been delegated numerous other powers in addition to his original functions. He can, therefore, of course, only personally administer his judicial office in the most important cases. Beside him, the Master of the Rolls holds a separate court as Vice-Chancellor; his Masters in Chancery become counsellors making reports upon the higher judicial and official business. The rest of the enormous mass of business is carried on as usual in permanent offices. The Lord Chancellors, who go out of office with the parties, exercise, as such, no important influence upon the administration, but they have the patronage of a very large number of highly paid offices. (1)

2. The Lord Treasurer in the eighteenth century appears as a rule the leading Minister of State. As the Lower House disposes of the national purse, a strong representation of the commoners was necessary in this department. Since George I., therefore, the powers of the Lord Treasurer were made over to a body, consisting of—

(1) A *First Lord Commissioner*, either a peer or a commoner.

(2) *Three or four Junior Lords*; among them, if possible, a Scotch and an Irish member.

(3) The *Chancellor of the Exchequer*, who is the second principal member of the commission, and always a member of the Lower House. This constitution of the central departments as a board is, however, now merely a nucleus for the formation of a number of higher offices. The First Lord has as a rule, as presiding minister, the general control of the administration, without any special connection with the financial department. The Junior Lords are confidential men selected from Parliament, who confine themselves to counter-signing important decrees. The head of the finance department is the Chancellor of the Exchequer alone. If the Premier (First Lord of the Treasury) is a member of the Lower House, he can be at the same time Chancellor of the Exchequer; if he is a peer, the offices are always distinct. (2)

(1) The department of the Lord Chancellor with its permanent bureaux is scarcely materially altered by a change of party ministries. It is greatly to the honour of the ruling class, and of the legal profession, that this great Chancellor has always preserved the spirit of judicial administration. Out of regard to the Upper House, in which he presides, the Lord Chancellor is now always raised to the hereditary peerage. At times this office also is put into commission, and then a commissioner speaker of the Upper House is appointed. The great "Court of the

Lord Chancellor" consisted in 1755 of the Lord Chancellor, the Earl of Hardwicke (at a salary of £2100 and fees; together more than £7000), the Master of the Rolls, twelve masters in Chancery, a principal registrar, the Duke of St. Albans, with two deputies, the clerk of the hanaper (the Duke of Chandos) and deputies, etc. (more than one hundred officials in permanent service). The Duchy of Lancaster contains an imitation of the Chancery on a small scale, altogether about thirty sinecures.

(2) The department of the Treasury

8. The *Lord President of the Council* loses with the council his former importance. His office is an honorary one, like that of a minister without a portfolio, and of itself is of no decisive influence upon State business.

4. The *Lord Privy Seal* seals the orders or warrants for the great seal, and accordingly is a controller of the ministerial course of business, without a separate administrative department.

5. The *Lord Chamberlain's* functions are those of superintendent and censor of theatres.

6. The office of *Lord High Constable* has ceased to exist.

7. The *Earl Marshal* is head of the Herald's Office.

8. The office of the *Lord High Admiral* has resigned its judicial business to the Court of Admiralty; for the administrative control, an Admiralty Office has been formed, consisting of a First Lord of the Admiralty, and six Junior Lords with a deliberative vote; all of whom go out of office with the ministry. (3)

9, 10. The *Lord High Steward* as active chief, and the *Lord Chamberlain* for the court department of the wardrobe, chaplains, physicians, etc., belong entirely to the royal household.

11. The *Ordnance Office* has consisted unchanged since Charles the Second's time, of the Master of the Ordnance,

includes, as a rule, the Prime Minister, First Lord of the Treasury, and the Chancellor of the Exchequer, in the capacity of minister of finance. The old Exchequer still continues as a very cumbrous general financial control with numerous offices, which are now in great measure sinecures for members of Parliament, and in part also are feudal hereditary offices. In the year 1755 the Treasury consisted of a *First Lord*, the Duke of Newcastle (£8000), *three Junior Lords* (the Earl of Darlington, Viscount Dupplin, R. Nugent), and the *Chancellor of the Exchequer* (Legge). The Exchequer consisted of the *auditor* (the Earl of Lincoln), the *clerk of the pells* (Sir Edward Walpole), the *four tellers* (the Earl of Macclesfield, Hon. T. Townshend, Viscount Royston, and H. Walpole), each with a deputy; the *two chamberlains*, Sir S. Stewart, and Sir W. Ashburnham, each with a deputy; several officers of the Exchequer department, the *usher of the Exchequer* (H. Walpole), paymasters, and so on. In the year 1780 the auditor of the Exchequer received as pay £14,060, each of the four tellers £7038, the clerk of the pells

£7597. To the account side belong twelve for the most part very ancient offices. Still more numerous are the independently formed under-departments of the Treasury; the upper custom office, the general excise office, the salt commission, stamp office, land-tax commission, general post-office, and mint. Certain heads of the under departments (such as the department of the demesnes and forests, and the board of works) received occasionally a seat in the cabinet. Including the under departments, the whole staff was so enormous, that the Treasury alone included about half of the whole civil service.

(3) The Admiralty Department consisted in 1755 of seven lords commissioners (£1000). To this department belongs a list of six admirals, nine vice-admirals, six rear-admirals, and 237 captains. The Navy Commission consisted of a comptroller of the navy, nine higher officials, and thirteen local boards for the arsenals; the victualling department of the navy consisted of seven commissioners, the treasurer of the navy, etc.

and five members, usually of Parliament, all changing with the ministry. (4)

Still retaining their names, titles, pay and fees, four chief departments of State have sprung from the old great offices.

(1) *A principal Department of State and Finance.*

(2) *A Department of the Lord Chancellor.*

(3) *An Admiralty.*

(4) *An Ordnance Department.*

To these departments are added others, which are formed by dividing the department of the Secretary of State. From the original position of a cabinet-councillor, the Secretary of State came to conduct correspondence in the name of the King with the local boards touching measures of internal government and police, and to correspond with foreign envoys and foreign cabinets,—functions which, in consequence of the altered position of the cabinet, were inseparable from parliamentary party government. Immediately after the Revolution, the Secretaryship of State, as an important office for a high peer belonging to the dominant party, was divided between a first and second secretary. Under George I. the first Secretary of State, Lord Townshend, was even regarded as Prime Minister. After the union with Scotland, a third Secretary of State was appointed, for Scottish affairs; but his office was abolished after 1746. In the year 1768 a third Secretary of State was created for the American colonies, but his office was abolished in 1781. Meanwhile, by arrangement between the two chief Secretaries of State, a division of the business was effected, into a north and south department. In the year 1781 a systematic division into a home department and a foreign department was at last effected. In the year 1794 the relations with France necessitated again the appointment of a third Secretary of State, for war, to whom in 1801 was entrusted also the administration of the colonies. Accordingly at the close of the period, out of the Secretaryship of State there had proceeded three further chief principal secretaryships.

(5) *A Principal Secretary of State for the Home Department.* (5)

(4) The department of Master of the Ordnance existed formerly under the Duke of Marlborough in a manner that at once gives an idea of the Whig administration of those times. The duke was Master of the Ordnance with £3000 salary, £1825 travelling expenses, £1000 representation money, and £2000 as colonel of the foot guards (besides £7000 as plenipotentiary of the Netherlands, £10,000 as commander

of two armies, £10,000 as commander of the Dutch troops, £15,000 percentage from the hired soldiery, £5000 pension; the Duchess held four court offices and a pension together amounting to £9500). The military branch of the ordnance office includes a chief of the engineers, eight directors, etc., and the whole artillery.

(5) About the middle of the eighteenth century the Secretaryship of

(6) *A Principal Secretary of State for the Foreign Department*, to whom the diplomatic and consular system was subordinated. (6)

(7) *A Principal Secretary of State for War and the Colonies* (since 1816 principally confined to the administration of the Colonies). (7)

Every secretary of State has as a rule two secretaries, who here receive the title of *under secretary*. But still the secretaries of State in the eye of the law are only considered as one person; the distribution of business among them is, accordingly, a matter of administrative arrangement.

In the nineteenth century, I may say at once, this process has been continued by the further division of the Secretaryship of State, and by the formation of central boards for new branches of a newly organized administration by parliamentary legislation (parliamentary boards). There have been added in particular—

(8) *A Secretary for War* who combines the old ordnance office and sundry under departments in a single ministerial department.

(9) *A Secretary of State for India*, after the older controlling

State still forms a whole in the sense that the geographical division predominates, and the division of business is subordinate. To the northern department belong nine envoys and ministers plenipotentiary, to the southern department a like number, added to these twenty-five consuls, twenty agents for the colonies, etc. The pay of a Secretary of State was in 1795 fixed at £6000, whilst under Elizabeth it had only amounted to £100 with free table. Since the systematic separation of the Secretaryship of State for the Home Department and for Foreign Affairs, since 1782, the home department consists in a very simple form of the Principal Secretary, two under Secretaries of State and a moderate staff of clerks. Connected with it is a series of functions concerning the administration of penal justice, which with us in Germany are assigned to the ministry of justice, whilst in England the office of Lord Chancellor is essentially confined to the province of civil justice. By being combined with the home department, criminal prosecutions and the carrying out of the sentence of the law especially gained a more elastic form.

(6) The foreign department consisted since 1782 likewise of one Principal Secretary, two under secretaries, etc.

(7) The department of Secretary for the Colonies and War was so constituted, that sometimes the colonies were the chief, and the war administration the secondary department, and sometimes *vice versa*. To the colonial department belonged, in 1755, an Auditor-General of the Plantations (H. Walpole), twenty-one governors with vice-governors, commanding officers, judges, and attornies-general. The paid army was in 1755 under two civil chiefs of second grade, the Secretary at War, and the Paymaster-General. The Secretary at War (Henry Fox), and the Paymaster-General (W. Pitt), form together the general department of war. Here as in all administrations of public money the salaries were exceedingly high, and were further increased by the balances which the officials in consequence of long delay in payments often retained in their hands for years and could make use of. The Paymaster-General, for instance, in 1781 had £3061 salary, but his balances for the twelve preceding years amounted to £558,898. The chief clerk had £460, which by fees rose to £7159. A survey for this time is given by Geisler, "*Geschichte Grossbritannischen der Kriegsmacht*" (1784).

office for the government of India had developed into a bureaucratic ministerial department.

(10) *A Chief Secretary of State for Ireland.*

From an extension of the poor office in our own day a central board has proceeded for the modern system of local administration by district boards (*Local Government Board*). Under the name of *committees of the Privy Council*, a *Minister for Trade* and a *Minister of National Education* have been created. All new formations, however, follow the bureaucratic system of departments. According to the arrangement of the cabinet for the time being, moreover, the Postmaster-General, the Paymaster-General, the Chancellor of the Duchy of Lancaster, and other officials of the second order can be favoured with a seat in the cabinet, and be also made members of the cabinet without portfolios, so that in the last century the number of members with a voice in the cabinet fluctuates between 10 and 17, and as a rule between 12 and 15. As well with regard to an easier arrangement in distributing the places in the ministry, as also with regard to the necessity of giving an elastic form to the ministerial administration in an era of reforms, the determining of the competence of the central boards by law has been avoided as much as possible, the distribution of business among all "secretaries of State" being rather regarded as a matter purely of internal administration; and in other respects also a definition of the department by the legislature has been avoided as much as possible.\*\*

\*\* This question of constitutional law, which has been the object of much discussion in Germany, has been spe-

cially treated by Gneist, "Gesetz und Budget" (1879. Abhandlung, ii.).

## CHAPTER LV.

*The Formation of Parliamentary Parties.*

As the dependence of the central Government upon Parliament has led in logical consistency to changes of ministries, so also the ascendancy of the Lower House led to the fixed organization of two parliamentary parties, which have since the beginning of this epoch alternately taken the reins of Government, the coalition ministries formed of both parties each time representing only a short period.

This party formation is the expression of the fixed political and social order, as it had now become perfected. It presupposes a constitution recognized by all parties, the uncontested position of a ruling class, and the internal harmony in the intermediate links of local Government, as well as the blending of the executive power with an ecclesiastical system recognized as a national Church. So soon as this unity in head and limbs has been attained, the fundamental conceptions of the State appear in the simplest possible form as two parties.

The philosophical ideals of a perfect political system, which without party strife shall unite together the natural diversities of a popular will to a one-minded and undivided will—be it republic or monarchy, democracy or aristocracy—are based on a misconception of human nature. Man, as a sentient animal, with his various necessities, is at all times and in all places dependent upon the outward goods of nature, the acquisition, possession, and enjoyment of which invariably forges a chain of relations of dependence, which in innumerable combinations form the firm strata of society, in which the individual with his family, and every wider community finds itself planted and bound in perpetual conflict with the interests of others. In this perpetual struggle for existence, in the constant endeavour to possess and to enjoy, to exclude others from this possession and enjoyment, and in the constant interest in getting rid of or diminishing personal dependence, and in consolidating and extending the dependence of others, every nation attains and asserts the greatest possible measure of human liberty only in subordination to the absolute



commands of a moral law in the Church and of a fixed external legal order in the State.

After bitter struggles the English nation had at last succeeded in reconciling the violent antagonism between society, State, and Church by internal perfection of structural cohesion. But that which had been thus united was and remained a twofold organism, built up of political and social elements, in the whole as in part, and therefore in as constant movement as the life of the individual, and on that very account the subject of a double conception and double direction of effort, according as the State is looked at from above or from below, according as the necessary unity of the political will, or the free will of the individual is taken as the starting point, according as the sovereign right of the supreme ruler, or the rights and liberties of the people are regarded as the highest principle of the whole. In the Long Parliament of Charles II. the great parties had become definitely distinct. The web of religious and political views, obscure in the civil wars and in the time of the Republic, has now become disentangled into two fundamental systems, which since 1680 find their popular expression in the party names of Whigs and Tories. As since the days of Magna Charta, with the development of self-government, of the Great Council and of Parliaments, the English conception of domestic policy is characterized by practically grappling with its immediate tasks, so after two generations of conflict between the extremes of Puritan and High Church theories, the predominating conception returned to that realistic tendency, which conceives of and formulates political questions purely according to the experiences of its own past.

The united gentry had overcome James II. The constitutions of Parliament, the county, and the corporations, as well as the whole legal system of the country, was declared to be inviolable by royal prerogative. The mutuality of the relation of rights and duties between the people and the Crown had, owing to the open breach of it on one side, again come to be clearly understood, and enforced as an "original contract" between King and people. The inviolability of the popular rights had even been sanctioned by the expulsion of a dynasty, and the legality of this event had become a necessary condition of the existing constitution. In the eyes of the one party this appeared to be the highest principle of civil liberty in the State:—the *right of resistance* to the Crown in the event of unconstitutional encroachments; *resistance*—the watchword of the Whigs.

On the other hand, it is after all only the ruling class that actually exercises political rights. It controls the central

administration through Parliament and the county through the office of justice of the peace. It needs accordingly a sanctioning authority in order to command the obedience of the lower classes. The million does not regard it as a ruler in its own right; it merely exercises its powers in the name of the King in Parliament and the King in council. Only as far as the reigning class itself obeys a moral law, which is incorporated for all classes alike in the Church of England, is a moral use of its power guaranteed; as on the other side for the mass of the people obedience arises not so much from a commandment of reason as from a feeling of duty and belief. In the eyes of the other party the highest principle was "*Throne and Altar*," or rather, with an intentional reversion of the words, *Church and Crown*—the watchword of the Tories.\*

Both party principles are reflexes of one and the same condition of things, linked together like the actual State and society in England. They are the conflicting creeds of the Middle Ages, which survive in a higher development in these parties: in the Tories the idea, inherited from the Church, of the necessity of a firmly established permanent executive power as the basis of civil order; in the Whigs the confederate ideas of the Germanic community as the basis of constitutional liberties. The political ideas which in the Middle Ages were divided between *imperium* and *sacerdotium* have now become fundamental conceptions within the political unity of the State. Both parties accordingly recognize each other, however far their ideas concerning the development of the constitution and the policy of the administration may differ.

Under the names of Whigs and Tories, throughout the whole of the eighteenth century, the wealthy classes gave the Government its policy—closely bound up with hereditary family traditions and the social interests of the gentry. The battle cries of the parties were at the commencement of the century still resistance and non-resistance; then the Stuarts and Hanover, then the American war, and then the French revolution. During the greater part of the century the Whig Government, with its recollections of the encroachments of the Crown, was on the whole in an ascendancy; during the last decades of that century, when the obedience of the lower classes was distrusted, the Tory Government decidedly predominated. But both parties are primarily factors of the

\* During the civil war Cavaliers and Roundheads were distinguished; in the movements of the Restoration, Royalists and Presbyterians, the court and country party; at the time of the

Exclusion Bill Petitioners and Abhorers; and immediately following these, Whigs and Tories, which were first used as terms of contempt at the elections of 1680.

ruling class, with great noble families at their heads. In the parliamentary elections a fluctuating majority is seen in the wider circles of the gentry and the enfranchised middle classes, which is not accidental, but in visible connection with necessary movements of the legislation, and the financial and foreign policy. Naturally, the views of the individual regarding the State are determined by individual experiences of life and by the general tendencies of the human mind; in this sense a Whig or Tory tendency may be found in every social group and in every individual. England's past has displayed in this matter a two-sided view, in exceedingly rich and vivid pictures, in which sometimes fear of "unbridled licence" in the people, and sometimes fear of "encroachments" of the Government obtained the upper hand.

The reasons urged in support of these theories are in harmony with the state of culture of the times. The theological reasons, from the standpoint of the Episcopalians and the Puritans, had in the course of the civil war and the Republic become much secularized. What still remained of them after the Restoration is less an expression of religious conviction, than the affected party language of a political clergy. The theory then prevailing derives the system of political government from the nature of mankind. On the one side, from the nature of freewill, was evolved the theory of "State contract," which in Locke's system is an abstraction of the English county and parliamentary constitution; on the other side a system of inherited "authority" is derived from the feeling of dependence and from the necessity of government which inevitably results from the nature of society. The influence of wealth upon the form of the State had not as yet in England attained to a systematic conception, but still lived in the consciousness of the nation as an important factor, after the experiences of the constitutional struggles. In Hobbes, the fundamental conception is clearly abstracted from the impressions of the civil war. This empirically national tendency has, since the seventeenth century, given both parties an historical point of view, the standard of which on the one side was the sovereign power of the Norman kings, and on the other the traditional liberty of the Saxon communities. But the enormous number of precedents was subjected to such a various classification according to previously adopted points of view, that even history, under the hands of partizans, changed its form, and the experiences of the past were no sure guide for the present.\*\*

\*\* For the theological reasons I may refer to Chap. xxxv. The eighteenth century stands essentially upon ration-

alistic ground. The theories then prevalent basing government upon the nature of the human will, do not so

Though the leading spirits both in Church and State regularly move in one party direction, yet the policy of both parties was limited by the administration of justice, and its further development into jurisprudence. The conservative feature of the constitution of Parliament, which accumulates customary law and statutes from generation to generation, and makes all changes in them dependent upon the agreement of all three factors of the legislature, had left behind a positive system of legal principles, which in definiteness left much, in specialty little, to be desired. Upon this given basis both parties found their hold. Both alike condemned the Stuarts' treatment of the tribunals, and by tacit agreement put an end to the abuse of the judicial power to serve party ends. With this century there begins for England a new era of judicial purity. A feeling engendered of bitter experience withheld the parties from meddling with the time-honoured constitution of the tribunals, and the legal institutions. In them was found the buttress of public and private law, as well as a judicial firmness of character, which among the conflicts of the day established and developed the existing law. The commentators upon English law endeavour to shape their matter in some measure according to principal points of view and maxims. From laws, precedents, and leading judgments there becomes formed a continually progressing, judge-made law, similarly to the manner in which

entirely in England, as on the Continent, overlook the fact that the State is no product of the abstract will, but that it rests like the individual man upon the basis of property and labour, and upon the needs, interests, classes, and ranks thereby produced. For this reason, in the seventeenth century, the historical method began. In this direction the works of Selden, Prynne, Cotton, and others are of lasting value, but they hold too much to the external appearance of the precedents. The one-sided deductions which (for instance) Brady and his school drew from true facts, made it a national duty to argue away the whole form of the Norman State by assigning to old indefinite expressions the later parliamentary meaning, taking certain maxims from the connection subsisting between various generations, and binding them together by the logic of later jurisprudence. This picture, devoid as it was of perspective, was called in England the "history of law." It has found for the Lower as well as for the Upper House a highly respectable

genealogical tree; its pious forgeries reach back even into the thirteenth century (*modus tenendi parliamentum*). "Thus, in our country," says Macaulay, "the dearest interests of parties have frequently been staked on the results of the researches of antiquaries. The inevitable consequence was, that our antiquaries conducted their researches in the spirit of partisans. It is therefore not surprising that those who have written concerning the limits of prerogative and liberty in the old polity of England should have generally shown the temper, not of judges, but of angry and uncandid advocates. . . . With such feelings, both parties looked into the chronicles of the Middle Ages. Both readily found what they sought, and both obstinately refused to see anything but what they sought" ("History of England," c. l.). A principal magazine for these arguments is Tyrrell, *Bibliotheca Juridica*, 1694. As to the English party literature generally, cf. B. v. Mohl, "Litteratur der Staats-Wissenschaften," vol. ii. pp. 38, seq.

the Roman jurisprudence developed its law from the *ratio* and from an originally scanty legislation. A systematic support was finally given to it by Blackstone's celebrated commentaries.\*\*\* The chief merits of this work are impartiality and perspicuous and pleasing description, together with a wonderful optimism of feeling which could, in a time of the open corruption of a Whig administration, form an ideal of the English constitution. Although the real practical basis of the English political life, self-government and the administrative organism are only fragmentarily treated, yet this treatise has, owing to its connection with a classical education and Montesquieu's division of powers, entirely influenced continental ideas of the English constitution down to the present day.

\*\*\* The party colouring of the historical, philosophical, and religious conception gave the legal profession, which was kept distinct from both universities, its high importance for the public law. But as the decisions and grounds for the decisions of the English *juris auctores* in their great collections were inaccessible to the Continent, the systematic compilation in Blackstone became almost the only source of knowledge for the European world. Its merits do not lie in comprehensive historical investigation, nor in depth of philosophic theories, but in the im-

partiality which pays due deference to the constitutional advocates of both parties, and after weighing the *pros* and *cons*, the facts and the reasons, the precedents of ancient times, the Middle Ages, and modern times, draws conclusions according to the custom of the judicial office. The clearness and elegance of the treatise have made Blackstone the centre of what is called English constitutional law. And the modern science of constitutional law has not advanced in England much beyond commentaries on Blackstone.

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## CHAPTER LVI.

## Theory and Practice of Parliamentary Party Government.

PARTY ideals, like those of a concentrated popular will, cannot be realized without a constant appeal to social forces and interests, which are at all times difficult to concentrate upon one aim. For every important measure, necessitated by the position of State or society, the cabinet needs in this constitution the consent of a majority in both Houses of Parliament, which involves a very high degree of self-control, subordination, and discipline, such as in Parliaments can only be acquired by a continuous discharge of the *ardua negotia regni*, and in the constituencies only by firm cohesion and by similarity of bases, as well as by the habit of common activity.

Every revolution, even the most justifiable and successful one, is a misfortune for a nation, because it shakes those cohesions and habits to their foundation, partially breaks through them, and occasions a storm of all the elements of social contrasts, the waves of which are scarcely calmed down in a single generation. It was a blessing for the nation that the greatest statesman of the time, William III., with the cool glance of a helmsman, steered the tempest-tossed barque of the State for half a generation. During this critical time the Crown still retained in its hand the initiative and the appointment of the ministers, even in spite of six changes of the cabinet, and an enforced regard to the party combinations in the Upper and Lower House. The great Prince of Orange did not succeed in gaining the thanks and acknowledgments of the parties, the sympathies of the nation, or even any appreciation of his policy.

With William's death this leadership ceases, and the return of the sway of the noble parties, which was so disastrous in former centuries, is now combined with the party system of the financially powerful Lower House. Under the vacillating Anne, party policy was so closely bound up with the interests of families and factions, that the constitutional ideals of both parties are sought for in vain. Upon the banner of the Whigs is emblazoned : Septennial Parliaments ;

the French war; the old commercial policy; no Popery. Upon the Tory banner: Triennial Parliaments; opposition to the French war, to protective duties, and limitations of trade; union with the Catholic faction in England, and with the national party in Ireland. Even the glory of the English arms is only reckoned as a party factor. The leading men are either without moral worth, or their great qualities are blended with meanness, as in the case of Marlborough. At Anne's death the return of the Stuarts seems almost to turn upon an intrigue of the nobility, which was frustrated by a counter-intrigue.

It was only on the accession of the House of Hanover (1714) that the permanent ascendancy of the great noble party, which had stood at the head of the resistance to the Stuarts, was secured. And with the consciousness of its decided superiority, the great noble league also regained a feeling of responsibility for the welfare of the country. But to gain the Parliamentary majorities necessary for the conduct of the political Government, the noble league had no longer at its command the old resources and ways of the monarchy, but only a shrewdly calculated exercise of the ministerial patronage of honours and offices, a careful utilization of personal and local interests, together with a strict party discipline for gaining and maintaining majorities. It was not easy to accustom English politicians; whose feeling of individual independence, and whose obstinacy are not less decided than those of the Germans, to that strict subordination under a party rule which is the essential condition of a parliamentary party Government. It required more than a whole generation, before the schooling of parliamentary parties under the discipline of an acknowledged leader was complete. The extension of the periods for which Parliaments were summoned from three to seven years by the Septennial Act (1 George I. ch. 2, c. 38), was very conducive to this end. Down to the ministry of the younger Pitt, intrigue and desertion is an only too frequent phenomenon in the party. But the actual necessity for a concentrated will in the conduct of the State, and the charm of political power at last solved this problem also.\*

\* With every change of situation the experience was repeated, that within this fixed rigid framework of public law a cabinet of *solidarity*, in close connection with both Houses of Parliament, had become an absolute necessity, because without it any movement in the political body did not appear possible. The tremendous difficulty of gaining for every important measure

the consent of many hundred intelligent, influential, and independent men, causes a clumsiness in a government by party, which only English energy, with its party discipline in the form of a cabinet has, in the course of two generations, overcome. Real progress, even in this more practicable form, is difficult enough, even at the present day, and every initiated per-

This Whig Government continued for nearly fifty years, and by systematically availing itself of all the powers of Government, succeeded in mastering the Tory opposition, consisting of country squires and clergy. But in doing this it certainly lost the ideal foundation of its party policy, now that its principle of "resistance" had lost its object. It is now nothing more than a combination of great noble families, which by agreement with the borough interests maintains a majority in the Lower House; but on that very account gradually splits up into intriguing coteries. The nation, however, accustoms itself to the ways of a party Government. Walpole's administration again strives for the systematic advancement of material interests, and deserves well of the country, whose commerce, finances, and general prosperity it promotes. But in all personal relations intrigue and a commercial spirit predominated. The method of bribery in Parliament first of all showed itself in the form of "retaining fees" for the Scotch members, and developed itself further into direct money payments, pensions, and sinecures. The rule of George I. and George II. allowed this manipulation of parliamentary majorities to proceed. Their German electorate was more intelligible to both than were the mysteries of the English Parliament. George I. did not even know the English language. Their civil list was punctually paid; the Whig Government did not even disdain to pay every mistress of George I. £10,000. The extension of the duration of Parliament from three to seven years, the immoderate personal pretensions of the members of Parliament, and the overgrowth of conflicts of privilege, as at the time of the Restoration are all characteristic features of this period of development of party government. In the interior of the country, throughout all these changes, the local government pursued a steady course, and this habit of common action begins again to react upon the Parliament.

George III. (1760-1820) ascended the throne with the firm resolve to break down the party government he found existing, and to assert the personal will of the monarch in the State. But in order to defy a party government which had consolidated itself for two generations, there would have been requisite a commanding intellect, the solution of a great

son knows what difficulties, now as formerly, the apparently omnipotent Prime Minister has to overcome, not only above and below, but also in the circle of his own colleagues, before he succeeds in inducing a cabinet of a dozen capable men, every one of whom has his own system, his own past, and

his own future, to unite in adopting resolutions. That eternal problem, how in a free State to blend the diversities of individual wills together into one united and single will of the State, is concentrated in an English cabinet as in a focus.



national task, and a judicious choice of prominent men, who were really fitted for the leading offices in Parliament. But the youthful monarch failed during the first twenty years of these attempts, quite as much in measures as in the lack of competent men. George III. certainly succeeded, by his personal adherents (the King's friends), in perpetually thwarting the sway of the parliamentary parties, and more than once, though with the best intentions, he injured the true interests of the State. But all the less did he succeed in defeating the established power of the noble parties; ill-timed endeavours of this kind even compelled him to accept for the first time a united ministry (1782) against his openly declared will.

But, nevertheless, the King had again become a positive factor in the State-system, and regained influence when, in conjunction with the regenerated parties, he began to pursue popular aims. Such tasks had again arisen for the English Government with the war against the American colonies; the highest tasks arose in the gigantic struggle against the French revolution. It was certainly only after the Crown entered once more into the struggle of the parties that the epoch of great statesmen begins, with whose names modern European opinion of the English constitution is intimately bound up. Even in this time the position of the parties remains a labyrinth of personal relations, and the system of corruption spreads, after the accession of George III., from the Lower House to the small boroughs. The real task of George the Third's life, as that of his statesmen, was only found in the great struggle against France, the social revolution in which country was diametrically opposed to the inmost nature of English society. In the period of this struggle Pitt's commanding intellect was at the head of a well-disciplined party, which, hand in hand with the King and the masses of the people, wielded a safe majority in the Lower House and an enormous political power until the national cause triumphed (1815).

There is certainly a curious contradiction in the fact that every new contribution to historical literature and memoirs brings to light new weaknesses in the times and in the men who adorn the acknowledged zenith of parliamentary government. But the reasons for this phenomenon are invariably contained in the nature of a self-governing society, and are accordingly repeated in every analogous period, and in the period of glory in every republic. The party government then in power, which required for every important act of Government the support of social forces, found itself face to face with a new and serious necessity. Now that it was no

longer practicable, in view of the powerful influence of the press, to buy the votes of individual members of Parliament, the parties at this time began to gain and to maintain the constituencies by artificial means. The immediately effectual means, that of employing the police-power and the "super-intending power of the State" to promote ministerial elections, of which the constitutional ministers of the Continent soon learnt to make use in order to defend their position, was denied to England. As the system of self-government, and the administrative jurisdiction did not permit of any threats of "disadvantages" to influence the elections in favour of the Government, there remained nothing left but the promise of "advantages"—a kind of bribery—certainly not for private interest, but for the purpose of carrying through a system of government considered to be right. A broad field for this was furnished by the small boroughs and Scotch constituencies, so that at the turning-point of the century the disbursements of the "borough-mongers" were reckoned at £1,200,000, in which system the rich self-made "nabobs" of the citizen-class vied with the country gentry. It is this system which disfigures the most glorious epoch of parliamentary government, and ever afresh brings before our eyes the fact that the real Parliament was in no wise a mirror of virtue, and that the mere history of the party systems, party men, and their great mass of family connections, with all human weaknesses and jealousies, scarcely allows of the greatness of this political system in its full development being understood or even dreamt of. And yet it has probably never been different in any free constitution. Rest and progress in the State alike demand in such a constitution a spontaneous party activity when in conflict with the antagonistic party, which brings society in wider and wider spheres into a state of discomfort, or else excites its deepest passions. This continual bringing together of a number of individuals to a unity of will, necessitates the employment of artificial party means, the subordination of the individual will to the iron discipline of party, and so much resignation on the part of the individual, so many feelings of vexation, and so much self-denial on the one side, and disappointment on the other, that the period of a free State is never a time of comfort and contentment for society. The mutual public criticism of party views may lead to undivided blame, but never to undivided recognition, for the test of character to which every person in a party-conflict is subjected is passed even by the best men of the time only according to the measure of human faculty. Such a system of government in its final result cannot be estimated by the position of a party government and party men at any

given moment, but must be studied by the light of the whole movement of the State, of the whole character of the people, and of the whole result.

This external result is certainly a magnificent development of the British power in all quarters of the globe, a progressive expansion of its warlike and commercial power in close bond of union with each other. And in its internal character also this period has in the main, as regards steadfastness and fidelity towards recognized truths, done more than other times and nations. On that very account the qualities of the *ἀρχαῖος πλοῦτος* and the *ἀρχαία ἀρετή* come unmistakably into the foreground. It is a thorough aristocratic government with its bright and its dark sides, certainly the best aristocratic government in the history of mankind, though in no way capable of application to other nations, in the absence of the previous conditions upon which it arose.

NOTE TO CHAPTER LVI.—*The Continental views concerning the system of parliamentary government* were always influenced by the state of things existing in those times, and among those nations that turned their attention to it; accordingly they form a history of their own. We must not only test in historians what they have found, but still more what they have sought. "There was a period which regarded England as the pattern of a political State, in whose constitutional forms the whole secret of its liberty and its fortune was said to lie. There came another period, which discovered nothing but defects in the same institutions, defects to which the other had been blind, and doubted altogether a liberty, that was so difficult to explain. The exaggerated admiration for England was followed by an equally exaggerated depreciation of it. The good had been sought where it was not to be found, and it was thought proper to deny its existence because it was not found where it had been erroneously sought. Curiously enough, it was a foreigner, De Lolme, who was the first to call the attention of the English to the secret charms and benefits of their constitution" (Jochmann's "Reliquien," ii. 134).

Not so much in the period of great parties and party leaders, as in a much less brilliant time, did the English constitution produce ineffaceable impressions upon the Continent, which were visible even before the middle of the much-agitated eighteenth century.

There lie behind these the first movements of the upper classes to gain an active share in State government; and most of all, where the bureaucracy had established itself earliest and in the most rigid form—in France. The verdict upon England was thus of necessity one-sided, like every view which seeks something that is wanting. Here was found a powerful and respected nobility, elected Parliaments, liberty in the commune, liberty of speech, and liberty of the press. These were the *desiderata*. The real origin of the English constitution and its social bases were unknown to Montesquieu. But he supplied the deficiencies with brilliant versatility and French perspicuity, from antique and mediæval ideas, building them up to a "system of the division and equipoise of powers," which through Blackstone and De Lolme became traditional in England. Nobles and prelates, knighthood and cities, all the bases of a Parliament had been present with us also in the Middle Ages—and in more grandeur than in England. The constitutions of the estates of the realm were based upon an uncontested right to vote taxes and to share in the administration. The division of the powers could readily be effected. Why should that be denied to the Continent, which in England so honourably existed together with the legal security and the prosperity of the country? In spite of numerous disappointments, since then the feeling has been left behind in the Germanic and Roman races of Europe, that no con-

tent can return and no progress be made towards attaining a vigorous political system, without analogous institutions. What is easiest to borrow is certainly the election of a popular representation upon a broad or the broadest basis with absolute powers over the finances of the State, and in consequence over the choice of ministers. But that is only an imitation of the external shell, without the internal essence, as the nations of South Europe have experienced to the detriment of their administration and the well-being of their people; whilst Germany, through its monarchical form of government and the deeper struggle of party contrasts, was compelled to lay the bases in a manner in some degree satisfactory, before it passed over to the forms of the parliamentary system.

A comparatively impartial picture of party governments as they really were in the first half of the century, is given in Hallam's "Constitutional Hist.," iii. cc. 15, 16; whilst Macaulay's brilliant description only brings us down to the beginning of the eighteenth century. From George III. onward, the relation of party governments to the Crown

has been thoroughly treated by May, "Const. Hist.," i. cc. 1, 2, 7, 8, with most praiseworthy objectivity. From the Tory standpoint the subject has been dealt with in Lord Mahon's "History;" more impartially in W. Massey's "History of England under George III." Cf. von Norden, "Die Parlamentarische Parteiregierung in England," in von Sybel's "Historische Zeitschrift," xiv. 45-118. For a verdict upon the real state of things there is needed, at all events, a knowledge of the historical writings of both sides, and, so far as possible, of the memoirs and special literature. To the special history of the parties belong from former times: Thomas Somerville, "History of Political Transactions from the Restoration to the Death of William III.," London, 1794. Wingrove Cooke, "History of Party, from 1666-1832," 3 vols., 1836-1837 (Whig). C. Lewis, "Essays on Administrations of Great Britain," 1783-1830, by Head, London, 1864. Medyn, "Chiefs of Parties," London, 1859, 2 vols. Cf. also Fischel, "Die Englische Verfassung," vii. c. 12. Bucher, "Der Parlamentarismus," second edition, 1881.

## CHAPTER LVII.

### The Parliaments of the Nineteenth Century down to the First Reform Bill (1832).

THE attempt to sum up the total results of the thousand years' political development of the English nation is a task of such magnitude, that the English historians themselves shrink from undertaking it. So far as it can be solved, it must be combined with a full description of the social, political, and ecclesiastical conditions of the present day. But what the present work may attempt at the close, is to give prominence to leading points of view marking the transition to the nineteenth century—the century of *social reform* and *reform bills*, which, as it has not yet run its course, does not come within the scope of an historical work.

During the eighteenth century, England, as the only great free State, stood alone amongst the other great European

States, in which the height of absolutism and the *ancien régime* held full sway. Excepting sundry small States, among the peoples of the old world, the English was the only nation that, after a long and honest fight, had victoriously triumphed over political and ecclesiastical absolutism and Cæsarpapism. It appeared as though this Germanic people was destined by Providence to preserve to Europe during the eighteenth century the picture of a free State, in order that in the nineteenth century it might be made the common property of the European world.

In its social and personal liberty were not, as in the ancient State, sacrificed to political liberty. For the first time in history there was here realized in a great State the full meaning of liberty :

*Social liberty*, that is, the legal faculty for the lowest to rise, by merits and talent, to possessions and honour ;

*Personal liberty*, which, with the full power of the executive, maintains respect for the person and property of the individual ;

*Political liberty*, enabling the people to impose upon itself its own laws, and to execute them itself in free self-government.

Nations cannot but desire liberty, thus defined, in its entirety. What may appear to a one-sided view as a limitation of liberty, was here as a fact only the fulfilment of its whole essence.\*

The internal strength of this community is due to the fact, that among all the contrast and conflict of social interests, it directs the efforts of the people to the welfare of the State ; that it arouses an interest in public life not only in the lords and gentry, but also in the middle classes ; and that it binds together all classes of society in this spirit, before all giving to the upper classes those manly aims and that energy which seek their scope and their value in what the individual is worth in the State. The most simple recognition by the State is here the aim and the pride of a man's life, whilst where this feeling is wanting in the aimless doings of the upper classes the multiplied honours of the State become worthless.

It is not the rights of Parliament and the forms of parliamentary government that have founded England's greatness, but (as in the case of ancient Rome) the personal co-operation

\* At the close of the Middle Ages the peculiar tendency becomes prominent, which by abolishing class-barriers has advanced the free development of the individual in an incomparable manner (p. 442). Elections and franchise, press and right of unions, have become the mighty bonds of this liberty, the essence of which is self-

activity in the State. They have, under these surroundings, become the powerful levers of liberty, where they bind together the ideas of a people, which in daily exercise of them has won the consciousness of public duties, the practical knowledge of the State, and the right feeling for it.

of all, from the lower classes in the social scale upwards, in the daily duties of the State. The individual institutions are simple, sober, and earnest, as in the old Roman life, far removed from the fantastic pictures once disseminated in Europe by the author of the "*Esprit des Lois*." But these sober institutions are firm and durable, and in the hour of danger and trial, when great tasks are imposed, they display the energy and the greatness of character of a proud free nation. In the struggle for the American colonies, and still more in the struggle with the French revolution, it was apparent from the results, what the education of a people for the duties of State may accomplish. In old England, upon a territory of the extent of about three Prussian provinces, a State had grown up, which incorporated Wales, Scotland, and Ireland, colonized the North of America, possessed itself of the wealthier part of Asia, as well as of a new quarter of the globe, had gained the maritime supremacy of the world, and an equality with the continental powers through the glories of its arms. And what seems to be more than all this, we perceive a nation, which, forming the pivot of the commerce of the world, had accumulated the wealth and the luxury of the whole earth, which in every generation had assimilated with its gentry numbers of parvenus and nabobs, and in all the fortune and glory of a world-wide dominion had preserved simplicity of manners, the love of truth, the fear of God, and the sense of justice and moderation that is due from the strong towards the weak.

It is human nature, that all progress, whether social, ecclesiastical, or political, should, on the other side, be productive of contradictions, disparities, and injustice—all which create ever fresh problems in the development of the nations of the earth.

We will grant that the magnificent development of the British nation since the day of Magna Charta was pre-eminently achieved by the courage of the upper classes of society, by their foresight and love of liberty, but we are yet obliged to confess that its blessings also tended primarily to the enhancement of the aristocracy. The English political system has, accordingly, the dark sides inseparable from all aristocratic states, due to the constant pressure they exercise upon the weaker classes. The State of the eighteenth century, although in the hands of the best aristocracy in Europe, did nothing to promote the advancement of the weaker classes; and to this end the Stuarts had also certainly never contributed a jot. During this period, little or nothing was done for the maintenance and emancipation of small landed proprietorships; whilst the *Latifundia*, on the other hand, had

steadily increased. The propertied class had never actually withdrawn itself from taxation; yet only under its influence could that luxuriant system of indirect taxes and protective duties for the benefit of trade and agriculture, but to the prejudice of the labouring classes, arise; or that profligate waste of the national revenue and the enormous indebtedness, to the detriment of the country at large. Only under a ruling gentry, could a system of civil justice be upheld, which, owing to its costliness, was inaccessible to the lower classes, and, side by side with excellent forms of penal procedure, a confused system of criminal justice, disfigured by exceptional laws. To this was added the lack of an effectual sanitary system and a pauper legislation, which spent itself in an illiberal system of settlement, and which, in spite of high poor rates, oppressed and embittered the lot of the labouring classes. The peace which the Anglican Church had concluded with the parliamentary constitution had, it is true, consolidated constitutional unity; yet the corporative independence of the wealthy State Religion still existed with tangible prejudice to the lower classes, who were abandoned to neglect by a Church now too aristocratic for them. Similar was the position of the universities, which maintained their corporate independence at the expense of learning. Science, so far as it was not fostered by corporations and endowments, was left to the energy of the individual and the protection of the great; the ways thither were inaccessible to, and unlooked for by, the masses. But chiefly, and before all else, the rich Anglican now vied with the powerful Roman Church in its complete neglect of popular education. Neglect, poverty, and demoralization are found in the broadest layers at the base of the social pyramid, and, in the ponderous structure of the parliamentary constitution, the difficulties in the way of all social reform were so many, that the most eminent statesmen of the eighteenth century in England were almost as sincere admirers of enlightened absolutism as the best educated classes on the Continent were of the English constitution.

Yet, in spite of these blemishes and failings, the cohesion in the constitution was so firm that, at the close of the century, there was as little prospect of revolution as of reform. From the bottom upwards, the mass of the working population was literally rooted to the soil and, except in few places, inaccessible to revolutionary ideas. On the other side, the position of the ruling class had become so secure, and had been so much strengthened by the national struggle with the French empire, that all immediate attacks upon it were sure to be futile. The ideas of the French Revolution and the emissaries of the Jacobin clubs produced, it is true, a certain

contagion, yet only upon a small stirring circle of fanatics and some doctrinaires among the ruling class. This fanaticism even culminated in attempts upon the life of the monarch, and in violent tumults, which appeared sporadically in convenient places. But such attempts were suppressed by the ordinary constabulary forces, only in a few cases calling for military intervention, and were merely followed by a few Acts of Parliament aimed at the repression of revolutionary pamphlets and societies (a Traitorous Correspondence Act, an Alien Act for the control of foreign subjects, and sundry kindred, but moderate, measures); all which passed the House of Parliament by large majorities. The mood of the nation was concentrated to such an extent upon the issue of the war with Napoleon, that no interest was felt in internal reform.

The close of the great struggle (1815) was followed by troublous years of bad harvests and commercial and industrial depression, affording a fruitful soil for socialistic agitation. This was the period of extravagant demands, and of huge, and sometimes violent, assemblages, which resulted in a serious loss of human life and destruction of property. These excesses called forth a series of temporary Acts of Parliament (Lord Sidmouth's Six Acts), which again passed Parliament by great majorities, although they went further in limiting the right of petition than either circumstances warranted or, considering the character of the constitution, was advisable. The Government under George IV. was, owing in some measure to the monarchy, somewhat vacillating; for changes of ministry were frequent—four distinct ministries once within eighteen months. The attitude of the propertied classes, however, left no doubt as to their determination to guard their possessions by all legal and constitutional means.

As in the twelfth century, so in this also, the first breach in this firm basis was made by ecclesiastical affairs. Although, after the fruitless attempts of the Stuarts, the National Church attained unconditional sway in England, and became in the course of the century reconciled and blended with the ruling class; yet this grand success was gradually followed by a want of fervour within the Church itself. The higher grades of the clergy were drawn into the "high life" of the aristocracy, whilst the majority of the benefices were committed to the charge of miserably paid curates, in spite of the growing spiritual wants of a rapidly increasing population. The period of enlightenment in England (as well as on the Continent), whilst introducing religious toleration among the upper classes, produced in them an indifference to the



education of the lower orders, which, in the second half of the century, drove numerous elements of the population to a methodism which offered the thirsty soul that which the aristocratic State Church denied. This dissenting methodism, though void of political aims, tended all the same to undermine the social scale and to lead to separation from the political system then obtaining. The glorious Revolution had, out of fear of popery, retained all the Test and Corporation Acts, which excluded dissenters from offices and political rights. A sensible contradiction to this exclusive monopoly of the State Church had now arisen through the union with Scotland, in which land the Presbyterian Church in turn entirely excluded the influence of the State Church, whilst in the English Parliament both Presbyterian and Anglican members were expected to exercise concurrently the highest political rights! Since the accession of George II., this contradiction was overridden, in the practice of ignoring Protestant dissent in official appointments, and by the constant repetition of a "bill of indemnity," declaring all infringements of the law which had occurred exempt from punishment. Thus were the Dissenters gradually placed upon an actual footing of equality, promoted by the progressive spirit of religious toleration. On the other hand, the exclusion of the Roman Catholics from all political rights was adhered to with obstinate consistency. Even the laws debarring them from the acquisition of real estate, as well as draconian penal laws, which were however not actually put in force, still obtained. George III., and the majority of the nation, perceived in that Church not merely an ecclesiastical, but an essentially political, institution, which, owing to its extension over all the States of the inhabited globe, and to its claim to external sway over the life of nations, as well as to its pretensions to a complete recognition of sovereignty in its spiritual head, was incompatible with the constitution of the country. This view was so deeply rooted in George III., that all attempts made to pass an act of toleration were foiled by his unyielding will.

The breaking down of this opposition was the immediate consequence of the difficult situation resulting from the union with Ireland. The rule of the Emerald Isle had for centuries been the blackest spot in the whole of English parliamentary government. The antipathy of the two races had, ever since the Reformation, been increased by the antagonism of the Roman Catholic Church, to which the great majority of the population remained faithful, whilst the conquering Protestant settlers were in the ascendancy in respect of landed property, commerce, and industry. For the latter, the

island was a conquered country, partly colonized, and administered, even in the eighteenth century, in a manner reminding only too vividly of the provincial government of the old Roman Republic. This complete neglect and merciless fleecing could not go on unchecked, now that the war with the American colonies had rendered a military occupation of Ireland almost impracticable, and made even the employment of the natives in the standing army and as volunteers unavoidable; to this was added the fact, that shortly afterwards the breaking waves of the French Revolution made their effect felt in Ireland. The English ministry now at length resolved upon conciliatory concessions, and began with an attempt to give the country an independent Parliament (1782). But it was soon perceived that want of coherence in the elective bodies, as well as the rivalry of nationalities, rendered a durable Parliament an impossibility. The union with Scotland became necessary as early as 1707, as the English and Scotch parliaments began to pass conflicting resolutions, which threatened to throw both constitution and government into confusion. The same thing occurred, when the independent Irish Parliament began to pass divergent resolutions affecting the Regency and other matters. But of still greater moment was the circumstance that this independent Parliament was regarded by the Irish national party merely as an engine for separating themselves from the Saxon land, which they abhorred both as a nation and as a church. This increasing tendency to secession burst forth, in the years 1794-98, in open rebellions and in French invasions, in which the native population behaved with a fury and cruelty which remind us of the wars of the red-Indians. Pitt here perceived no other way of escape but to unite the country with England upon terms of economic and political equality. The State taxation was regulated according to a fair scale; the numbers of deputies (according to an average of population and taxation) fixed at 100, and to the Upper House were added a smaller number of 28 members elected from the Irish peerage for life. The accomplishment of the union appears to be one of the *chefs d'œuvre* of this illustrious statesman.

But with the union with Ireland, the ecclesiastical basis of the parliamentary constitution was brought into a new position. In England itself, a considerable portion of the population no longer owned the Anglican Church, and this number at the beginning of the century amounted to several millions. In Scotland, more than three-quarters of the population belonged to the Presbyterian Church, even to the strictest exclusion of the Anglican. In Ireland, more than three-

fourths of the people, now blessed with equal political rights, belonged to the Roman Catholic Church, in the face of whom the Anglicans could no longer assert their position of being both politically and ecclesiastically considered, the sole privileged class. A united church in a united State, as the basis of the parliamentary constitution, had thus become an impossibility. Next followed (1828) the formal repeal of the Test Act and Corporation Act, and with it the actual rending of the old bond between Church and State, which had, in the case of the Dissenters, been already dissolved. And now at length, after a struggle which had been protracted for more than fifty years, there followed, as an inevitable consequence, the so-called Act of Emancipation for the followers of the Roman Catholic Church. The fatal policy of the Stuarts was still in such vivid remembrance, that the Saville Act of 1778, which only repealed some few of the draconian penal laws, viz. against the reading of mass, against the education of children in Catholic schools, and the incapacity of the Catholics to acquire real estate, led to the formation of a great counter-league of threatening attitude, and, two years later, to the dangerous Gordon Riots. The constant revolts and the enmity of the Irish population kept these feelings so much alive, that Pitt in 1801 found himself unable to add the clause of emancipation to the Act of Union. This was the sole reason for the resignation of the great minister, who, in 1804, was summoned by George III. to his second ministry, only under the condition of relinquishing this question. In the year 1807, Grenville's ministry was again wrecked on this rock. The years 1818 and 1817 saw the Grattan bills; 1819, motions in this matter were renewed in the Lower House; and in the years 1821 and 1825 in the Upper. But it was the threatening revival of the Catholic Association, the illegal election of O'Connell as member of the Lower House, and the recent repeal of the Test and Corporation Acts that, in 1829, brought the matter to a climax. George IV. having once more, in consequence of the intended alteration of the oath of supremacy, withheld his consent, yielded to the consequent resignation of his ministers; whereupon the bill passed, by 320 to 142 votes in the Lower House, and by 213 to 109 in the Upper.

*A breach was thus effected in the entrenched position of the ruling class, through which further reforms might begin to pass.*

Already, in the first decade of this century, the legislature had shown a somewhat altered frame of mind by passing some *social reforms*. The ripe fair fruit of twenty years of assiduous labour was (1807) seen in the legal prohibition of the slave trade, which, in spite of the great sacrifices it en-

tailed, was forthwith carried into execution in every detail. The repeal (1824) of the old penal laws against labourers' unions and of certain hindrances to their freedom of settlement was an important boon to the working classes. The modest beginnings, too, of factory laws for the protection of operatives began to be visible.

With an equally modest commencement did a tendency towards *administrative reforms* begin to show itself; such as the suppression of the excessive number of sinecures, all created in the interest of the ruling class; the appointment of a commission to reform the antiquated Court of Chancery; reforms in the customs tariff, so overburdened with protective duties; the abolition of the trading monopoly of the East India Company, and modifications of the Navigation Acts.

There was, however, no prospect of thorough political reform whilst the constitution of the Lower House remained so marvellously knit up with the upper classes, both in country and town. A removal of these anomalies would necessarily attack the very heartstrings of the ruling class of society. The unjust anomaly of a mass of borough constituencies, more than ten times as strongly represented as they should be, considering their population, had long been recognized. The first proposal, an ill-considered bill, brought in by the Duke of Richmond (1780) to replace it by an universal equal suffrage, was rejected without division. The very moderate proposals of Pitt (1782, 1783, 1785) to disfranchise only thirty-six decayed boroughs, and to distribute the vacant suffrages between the counties and the metropolis, failed even to pass the House of Commons, as that body could not calculate what influence this amputation might not exercise upon the strength of parties. In vain did the newly formed "Society of Friends of the People" offer (1792) to prove, that at that time some 200 members of Parliament represented small boroughs of less than 100 electors, and that altogether 857 members were as good as appointed by 154 powerful patrons. According to a later calculation, 300 members were elected by the influence of peers, 171 by the influence of powerful commoners, and sixteen owed their seats to royal influence, so that there only remained 171 freely elected members. The Lower House refused all revision of the numbers of qualified electors; and the bloody scenes of the French Revolution now unfolding themselves before men's eyes, as well as Burke's fiery "Reflections on the French Revolution," filled public opinion with such dread of enfranchising the masses, that Grey's motions (made in 1793, 1797) were rejected in the Lower House by overwhelming majorities. The international war now being prosecuted against Napoleon

riveted the attention of the nation to such an extent, that even Brand's motions, in 1810 and 1812, found but little support. The peace of 1815 was again followed by years of famine and commercial crises, by dangerous insurrections, a brutal attempt upon the life of the Prince Regent (1817), and a Cato Street Conspiracy to murder the ministers (1820). Hence the now so-called radical reformers found an exceedingly unfavourable soil upon which to work. Sir F. Burdett's (1818) radical motions were rejected by 106 voices to 0. It was not until 1821 and 1822 that Lord John Russell dared to reintroduce proposals, which were, it is true, rejected in the Lower House by 269 to 164 votes; but the attitude of the press towards them was such as to augur a change of front in this respect. A petition presented by 17,000 *freeholders* of the county of York (1823), showed that this was no longer a question of artificial agitation, but of an *altered basis of society*, in consequence of which powerful propertied masses now supported the demand for reform.

During the course of the great struggles with France, changes, at first almost imperceptible, had been made in the interior of the country, yet changes which make the nineteenth century a completely new epoch even in English political life. The invention of the machine began to draw certain branches of rural industry to the towns; speedily attaining to greater dimensions in cotton, wool, flax, and silk, and reacting upon a rapidly increased consumption of coal, iron, and raw material, it soon concentrated industry and trade in a way formerly unknown; after the conclusion of peace in 1815, it also began to react upon agriculture, and finally, hand in hand with facilitated communications, to alter the economic conditions of the whole country. From decade to decade the transformation of the system of production became more and more apparent, as steam (and, shortly, railways) increased the pace. Real and personal property, productive and intellectual labour, entered into new and multifarious combinations, which, slowly progressing, shifted the propertied power from the landed estates to the capitalists. Production, consumption, and exchange, passed into a new and uniform system embracing the market of the world, and one which, in England, owing to its world-wide commerce and colonial possessions, attained to a most magnificent development.

Simultaneously with this reconstruction of the propertied and industrial conditions of the country, there now appeared a new link in the relations of society to the State.

The accumulation of funded and industrial capital led to the formation of a large number of new households with an *independent personal estate* equal to the average income of the

quondam ruling class ; these, by the acquisition of real estate, and by filling the civic office of justice of the peace and the magistracies, coalesced in many cases with the landed gentry, without, however, participating in an equal degree in their habitual duties of public life, and lacking therefore the consolidated political influence of that older gentry.

The new combinations of capital and labour, the ever-increasing application of intellectual and technical knowledge and the business requirements of great trading and industrial firms, led likewise to a corresponding increase in the *middle classes*, who, although they paid rates and taxes on precisely the same scale as did the freeholders in the counties and freemen in the towns, were yet, according to the existing constitution, in great measure excluded from the franchise.

The *labouring classes*, finally, were, by the great industries, brought into almost entire dependence upon industrial capital, were as a rule without any participation of their own in the community of their neighbours, and had not the franchise.

The fusion of these new elements into the parochial union (which even to this day is the chief difficulty of the German Commune) took place in England with great ease, as the English parochial rates, following the elastic poor rate system, were from the first levied upon the actual occupier ; the parochial rates upon houses and manufactories had on that system long since outstripped the parochial burdens laid upon land. But, on the other hand, the admission of these new elements to the parliamentary franchise met with the same opposition as was the case in the representative systems of the Continent. The rights of suffrage in the Middle Ages were inseparable from feudal and free tenure, which at that time bore the whole of the State burdens. This fact had long been forgotten. These political rights had from generation to generation been alienated and acquired with the possession of the land, and, as such, were, on their broader English basis, guarded with the same jealousy as were the political privileges of the aristocratic landed estates on the Continent. This view was so deeply rooted, that Pitt, in making his reform proposals of 1782, was for purchasing the rights of the thirty-six decayed boroughs for £1,000,000 sterling, and, in effecting the union with Ireland, actually carried out such a system of purchase. The privileged freeholder in England could not therefore be readily induced to accord to the copyholder, the leaseholder for sixty years, or the mere tenant for a term, an equal suffrage with himself, even though, regard being paid to the altered value of money, the forty-shilling qualification was raised five to twenty times. The landlord in the towns more readily acquiesced in the occupier being placed

on equal terms with himself, inasmuch as the system of select bodies was no longer feasible, and the occupier had long since had to bear the chief parochial rates and taxes. Thus it was that the towns, as a rule, inclined to the idea of reform. The struggle for the reform of the franchise appeared, accordingly, from the first nothing but a struggle for the privilege or equality of certain tenures, and has retained this character to the present day. (1)

Meanwhile, the first generation in the development of industrial society had run its course, and behind the reform movement stood no longer an agitation of the friends of radical reform, but a justifiable feeling of inferiority made itself felt in the new elements of the propertied classes and middle ranks. Their strength lay in the large towns, which were either unrepresented, or quite inadequately represented on the parliamentary register. But even in the boroughs summoned to Parliament, the old-fangled municipal constitution, limited to the select burgesses, excluded them from political rights. In the country districts, the qualification of freehold was as much out of harmony with social conditions as with the rateability of the middle classes of industrial society. The representation of the northern and southern counties of England was out of all proportion to its present population. In Scotland the total electorate in the counties was restricted to 2500 heads, that of the boroughs to 1440, and that of the capital, Edinburgh, to thirty-three. The powerful influence of the press, and the right to establish unions, lent these aims and aspirations a weight which the ruling class now for the first time learnt to feel.

The consciousness of this new situation burst suddenly and unexpectedly forth, in consequence of the July Revolution in France, which gave the so-called *middle classes* in England the required influence over the Government, and, by virtue of the constant contagion it spread, (2) made the reform of Parliament at last an unavoidable necessity. The laws of 1828 and 1829 had cut away the ground under the feet of the high Tory party of obstinate resistance. After Wellings-

(1) The classes which were newly formed by the propertied and industrial conditions of the new society can, to a certain extent, be ascertained from the census tables compiled every ten years, and in the lists of the income tax and local rates, which last show how rapidly income derived from house property, from manufactories and mines, increases in comparison with that derived from land.

(2) The contagious influence of the

July Revolution, with its ideas of popular sovereignty, was seen at the beginning of the third decade in a number of phenomena, which have since been forgotten. I remind my readers, for example, that in the wards of the freemen of the city of London formal resolutions were passed insisting that members of Parliament should for the future receive binding mandates from their constituents.

ton had, in September, 1830, solemnly declared that the parliamentary constitution needed no reform, in November, 1830, Lord Grey presented parliamentary reform to the House as the *ministerial programme*. On the 1st of March, 1831, Lord John Russell introduced the first draft of the Reform Bill, which, after a debate lasting seven nights and after seventy-one speakers had been heard, was admitted to the first reading, but only passed the second by 302 to 301. Having regard to the prevailing feeling of the population, William IV. was induced to dissolve Parliament, which, on its re-election, showed a very considerable majority for the proposed reform. The bill now passed the second reading in the Lower House by 367 to 231; and, after long obstructions, the third reading also by 345 to 239. But, on the 8th of October, 1831, the bill was thrown out in the Upper House by 199 to 158, the consequence of which was a profound commotion, such as had never before been known in the country, accompanied by many violent disturbances.

A third bill was presented to the House in December, 1831, which passed the second reading by a majority of 162, and now, at length, passed the Upper House (after a few amendments had been made in it), by 184 to 175 voices. Yet a dilatory amendment of Lord Lyndhurst in the House of Lords again jeopardized the bill. The feeling of the country declared itself during this interval in a more serious manner. Several lords were insulted by the mob, Nottingham Castle was set on fire, and great destruction of property caused by violent insurrections at Bristol. It was impossible any longer to procure from juries verdicts against the authors of the passionate squibs of the time. Lord Grey calculated the number of crimes committed in consequence of the Reform Bill at 9000. The ministers, accordingly, demanded a new creation of peers, which was refused by the king; the ministers hereupon resigned. However, after the Duke of Wellington had vainly endeavoured to form a cabinet, the king personally intervened by privately communicating with the dissentient lords, requesting them to refrain from voting, whereupon the bill passed into law by 106 to 22, and simultaneously the kindred reform laws for Scotland and Ireland. The new basis of the Lower House was now as follows—

- I. ~~With~~ <sup>With</sup> respect to the constituencies, the Reform Bill followed the sound principle of retaining only real *communitates*, that is, counties and municipal boroughs, as constituencies; whilst paring down and restricting the totally decayed boroughs and distributing the vacant seats among the greater districts which had hitherto been insufficiently represented. Following this



principle, 56 smaller boroughs, of less than 2000 inhabitants, among them the notorious Old Sarum, were completely disfranchised; and 80 smaller boroughs of 2000-4000 inhabitants limited to a single member. On the other hand, 22 more important towns, hitherto unrepresented (Manchester, Birmingham, Leeds, etc.), now received two representatives; 20 other towns (18,000-25,000), one each; 25 great counties were divided into two divisions each, each of which returned two members; seven counties received three instead of two representatives; three Welsh counties, two representatives in the place of one. The remaining seats were sufficient in number to give Scotland 58 (instead of 45) and Ireland 105 (instead of 100) members.

II. With regard to the electoral qualifications in the counties, the old franchise of the forty-shilling freeholders was retained; yet in freehold for life, the right of franchise was made inseparable from the condition of actual possession, in order to prevent a multiplication of votes by a parcelling of estates. Apart from this reservation, *freehold* only gave the franchise, where a yearly income of £10 was derivable therefrom. In like manner, *copyhold* and *leasehold* for 60 years and upwards, of an annual value of £10. Leasehold of 20 years and more, only in case of £50 annual value. According to a Chandos Clause, inserted in the Upper House, every tenant and other lessees were given the franchise, where the rent amounted to £50 and upwards.

Through the decay of the municipal corporations in the towns, all principle in the matter had been so far lost, that by 2 Geo. II., c. 2, it was provided that that right of suffrage should always obtain, which had been accepted in the last decision of the Lower House. The Reform Bill gave the franchise in every case to the municipal middle classes, that is, to every occupier (whether owner or lodger) of a dwelling, a shop, a bank, or building of £10 annual value.

All rights of franchise were after the old system calculated not according to taxation and personal political duties, but according to tenure. But, in order to guarantee the cohesion of the electoral bodies, an actual payment of taxes and a lengthened residence within the constituency or an acquisition of real estate by inheritance or marriage settlement remained the essential qualification.

III. With respect to the electoral procedure, an important innovation borrowed from France was introduced, namely, that complete registers should henceforth be made by the local authorities, under the control and supervision of revising barristers, with appeal to the high courts of justice. To be entered upon the register was a necessary condition pre-

cedent to exercising the franchise. Whilst in former days the tedious legitimation of the electors protracted the election for weeks, the poll now became limited to two days, and soon to one, and thus the old election disorders were in great measure put an end to. A sharp *Corrupt Practices Prevention Act* (1854) attempted finally to prevent bribery and corruption still more thoroughly. (8)

The number of electors, which at the time of passing the Reform Bill was reckoned at 400,000, was by that bill as nearly as possibly doubled. On the completion of the new electoral system (1852), in the county elections for England and Wales, there were counted: 322,619 freeholders, 23,097 copyholders, 21,104 leaseholders, 99,019 tenants from year to year. The number of borough electors too was given in the draft for the second Reform Bill at only 488,920. Moderate as this extension appears, in comparison with the constitutions of the Continent, yet, considering the position of the English parliamentary constitution, it still sufficed to make the middle classes no longer a moderating but a leading factor of the parliamentary system.

(8) The technical details of the Reform Bill have been here intentionally passed over, and especially the not very considerable divergencies in the Reform Bills for Scotland and Ireland. These details have been

given in English treatises in a very complicated casuistry. For the most explicit treatise *vide* Lely and Foulkes, "The Parliamentary Election Acts," London, Clowes and Sons, 1885.

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## CHAPTER LVIII.

**The Parliaments of the Nineteenth Century down to the Second Reform Bill (1867).**

IN ancient times an aristocratic constitution, as found in England at the commencement of the nineteenth century, would have ended with the oppression of the lower classes and in a helotdom. It is a grand testimony to the power of Christianity and nationality—especially in the ruling class in England—that from those conditions the English society effected a transition to a *century of Reform Bills and Social Reform*. In like manner, we shall not be able to deny the old Whig party the recognition that, faithful to its traditions, it carried out the difficult task of reforming the popular representation with courage, persistency, and judgment, and without destroying the old cohesion of the elective bodies of the House of Commons.

In the January of 1833, the first reformed parliament, in which only 172 Conservatives opposed 486 Liberal members and their associates, assembled. In the very first session of its meeting, it was confronted by a whole pile of reform measures, which, proceeding from a long-checked current of popular opinion, were doomed to speedily present great difficulties to the present majority and its ministries. The reform movement which had now burst forth, is divided henceforward into the threefold tendency of social, administrative, and political reforms.

1. *The province of social reform* was primarily directed against the class privileges of the old ruling class. Using great moderation, this tendency contented itself with repealing the qualification of £600 and £300 income from real estate for the representatives of the counties and towns respectively. This qualification had been introduced a century previously, in order to render it difficult for capitalists to enter into competition with the landed gentry. It was now simply abrogated (1858). Motions for depriving the bishops of their political functions in the Upper House, and for creating a number of life peers in addition to the hereditary peers, were as yet rejected.

Still more incisive were the attacks made upon the *economic privileges* of the ruling class. First of all, upon the great trading monopolies which were abolished after fair compensation; next, upon the overspreading system of *protective customs*, which being universally recognized as pernicious for a country marked out for a great commercial and industrial future, were in great measure suppressed, and reduced to a few profitable finance duties. The Corn Laws followed suit, after violent resistance. Although Lord Melbourne, as late as 1839, had declared that he considered the plan of leaving the great agricultural interest without protection most quixotic and idiotic; yet the Anti-Corn Law League and the power of the press in the years 1838-1846 managed, under Sir Robert Peel, to pass this measure also. The powerful interest of the land had also to accommodate itself to the redemption of tithe, to the regulation of the peasant burdens of copyhold, and to a system of the partition of common rights (though with comfortable modifications).

The demand for religious equality necessitated the further repeal of certain antiquated penal statutes, and the granting to the dissenting sects of many rights necessary for the management of their property and the conduct of their services. The admission of Jewish members to the Lower House met for a long time with the resistance of the Upper House, but was at length (1858) rendered possible by a clumsy and dangerous compromise, which permitted each house itself to prescribe the form of oath for its own members. (1)

As in old days at the Magna Charta crisis, so now in the nineteenth century, did the propertied classes not forget that care for the weaker classes is the vital condition of every free constitution. The grand work of suppressing the slave-trade was extended yet further to the far more difficult task of abolishing slavery itself; this was accomplished circumspectly and successfully, at the expense of £20,000,000 sterling from the State coffers. Far more difficult and manifold were the social reforms in favour of the *operative classes*.

Favourable as was, in the first decade, the influence of steam-power and manufactures for the external independence and wage-earning of the working classes, yet, as time went on, the wages question became more unfavourable. Within a generation there was produced in the new "proletariat" a picture of a degenerated family life, visible in lodging, food, clothing, ill-health, poverty, and the starvation and degradation of women and children, which for many decades showed the black sides of

(1) An Act of Parliament for giving civil equality to the Jews, passed in the year 1763, but in consequence of

the violent opposition of public opinion it was withdrawn in the following year.

the new order of society. The years next following the Reform Bill were, owing to the commercial depression of the time, calculated to give these classes, in their spirit of opposition to the propertied classes, a feeling of common misery and of great common interests, which after 1839 assumed a threatening character in the Chartist movement, which, however, finally ended in a mere mass-demonstration (1848). Without showing itself dismayed by the threatening attitude of the working classes, the legislature at once addressed itself to the practical solution of the social questions, and began by removing the worst ills attendant upon family life; restricting the work of women and children, shortening the hours of toil, removing the immediate dangers to life and health in factories and mines—by appointing factory inspectors, upon whose reports the protective measures should be expanded and extended from decade to decade, and by forbidding the truck and cottage system, so as to prevent a recurrence to villeinage. It afforded legal protection to the weaker classes, by granting a system of civil justice accessible to all alike, an effectual court of arbitration, and by guaranteeing the freedom of trades unions, even to the enforcement of higher wages (modified, of course, by penal clauses against abuse of them, which sometimes showed itself in a flagrant form). But of immediate and permanent effect upon the amelioration of their condition was the reduction of the prices of all the necessaries of life (corn, meat, tea, coffee, etc.), as a result of the repeal of the Protection Laws, thus lowering the housekeeping budget of the poorer classes by one-third, on an average, whilst the freedom of unions and the conditions of the international market obtained a slow, though on the whole, steady increase in wages. The thorough and very valuable sanitary and building reforms, in a series of Public Health Acts, primarily benefited the working classes. For the much neglected elementary education, Parliament, in the year 1833, voted £20,000, which sum, in the course of years has been raised more than a hundredfold, and has developed into a steadily progressing system of popular education. This social legislation, embracing, as it does, all sides of economic and family life, has known how, at the same time, to promote free self-help by an adequate regulation of the union system, in savings banks, burial clubs, sick clubs, friendly unions, mutual societies (under certain circumstances, also, with State guarantees and State grants). Finally, for the unemployed, we meet with kinder and more humane poor-laws, doing away with, at all events, the narrow-minded repulsive system of former generations. This side of State policy is and remains essentially an endless one, and,

considering the peculiar conditions of the greatest industrial and commercial State in the world, is not yet able to satisfy the weaker classes. Looking back, however, upon what has been done and attained in the course of a generation, we are compelled to admit that the legislature has worthily recognized its duties and has remained faithful to its position as a propertied class in a free country.

II. The province of administrative reforms addressed itself to the reform of the abuses which at all times arise in the appointments to and the management of public offices, under the stable sway of a ruling class. But here the excessive precision used in laying down all the rules of administrative law by statute, much as it tended to protect against the abuse of party-government, gave, on the other hand, to the whole system a clumsiness and rigidity which rendered these reforms most difficult to make. The generation immediately following the Reform Bill displayed here also a great energy, comparing very favourably with the contemporaneous condition of most continental states.

In the *department of war*, the experiences of the Crimean war led to the comprehension of the whole administration under one war office. The place of universal military service, unfeasible in the case of England, is taken by a wide system of volunteer corps, which contains the germs of further development.

*Justice* also experienced very energetic reforms in the institution of the new county courts, which for the first time afforded a system of civil justice accessible to the public at large; in the thorough reconstitution of the civil procedure, the chancery procedure, and in the newly organized courts of probate, bankruptcy, and divorce. The criminal procedure attained a practical form for the metropolis, in the institution of a central criminal court, as also in a model system of preliminary examination, and the codification and extension of summary criminal procedure. Thorough reforms were made in the confused and intricate criminal law. Whereas, during the period between the Restoration down to the accession of George IV., not less than 187 transgressions of the law were visited by capital punishment, the death penalty was henceforth confined to high treason and murder; the punishment of the whipping-post and the numerous penalties of confiscation were abolished, and transportation for life replaced by a rational system of imprisonment.

In the *department of finance*, after the system of protection had given way to the policy of great finance-duties, by the cancelling of many hundred parliamentary statutes, a consolidation of the Customs, Inland Revenue, and Stamp

Acts was brought about. Sir Robert Peel's Income Tax law, with the insertion from time to time of amendments, has given proof of its vitality. The much-prized post-royalties passed into the penny post system. For the control of the finances, so neglected by party governments, the Commissioners of Audit, in conjunction with the Bank of England and a financial commission, appointed effectual organs, as it did also in respect of the newly formed Commission of the National Debt.

In the *home and police department*, the parochial constables, whose services had become insufficient, were supplemented, first in the metropolis and afterwards in the country, by paid police in military organization, all brought into practical connection with the police courts and the justices of the peace. Certain branches of trading laws, especially affecting public-houses, were newly consolidated; these latter, after many experiments, having again to be dependent upon the magistrates for their licence. After a careful consideration of the agricultural and game interests, the game law of 1834 was passed, which put an end to numerous social injustices.

In the field of commerce, the codified *Merchant Shipping Act*, as well as a fragmentary piece of legislation to replace the somewhat deficient State control of private railways, are of importance.

A *strongly modernised department of home administration* was developed from the economic self-government of the parishes. It was opened by the great *poor law legislation* (1834) and its numerous amendments, in carrying out which a central poor-law board, with its inspectors and auditors, presents a picture of centralization such as was until then unknown. By the formation of unions of parishes and the building of workhouses, the severe abuses of the ancient regime were energetically removed, though still attended by great hardships. Next came the *Highway Statute* of 1835, which, in the formation of greater unions, followed the example of the pauper legislation. After numerous unsafe experiments, the *Public Health Act* (1848) and following statutes brought some degree of order into the sanitary and building regulations of thickly populated districts, through rigorous powers of inspection exercised by a central board. In the case of towns having a municipal constitution, a new municipal law was passed in 1835, which, removing the antiquated and decayed state of things, replaced it by a uniform government by mayor, aldermen, and town councillors, retaining the police control in the hands of special commissions of the peace appointed by the crown. After a generation had passed away, this local government of the new style was formed into

one whole under a newly created minister (Local Government Board).

In the department of *church government*, the State found analogous tasks as in the "self-government," inasmuch as, owing to the old legal control and the corporative character of the Church, grave abuses had crept in, such as the Church, as a body, did not on its own account know how to master. As carefully then as benevolently was the government of State Church property reorganized by mixed boards, its dioceses and offices increased where required, thousands of churches and chapels founded by State and private means, and richly endowed for the needs of instruction and religious service. With like consideration, to the avoiding of questions of dogma, were, after reference to ecclesiastical commissions, the vexed questions of ritual, of Church discipline, and the formulating of the oaths of office, settled; thus restoring to the State Church a rejuvenescent activity both in teaching and preaching—in marked contrast to the condition of things which a hundred years previously disgraced the Anglican Church.

In the field of *education*, reform contented itself for the present with gently compelling the universities and foundation schools to make new statutes. More energetic was the advance in the elementary school system to comprehensive regulations under the conduct of a new minister (1856), and with a special department for promoting art and industrial schools by the aid of considerable State allowances.

In the province of *colonial government*, the mother country decided, after bitter experience, to grant independent governments to those colonies, which, owing to their situation, their population, and degree of civilization, were most fitted to receive them, reserving a supreme legislature in the English Parliament. The government of the East Indian Empire, after the suppression of the Sepoy rebellion, was, by a new law of organization (1858), handed over to the central government, which exercises control over the governors, the tribunals, and the chief departments of administration, as also over appointments.

More than one hundred comprehensive administrative statutes and a reorganization of the whole of the civil service testify here also to the energy of the British parliamentary Government. (2)

(2) The English administrative law, which appertains as much to the nature of the English political system as does the parliamentary law, was, at the time when the constitutional

theories in France and Germany were laid down, as good as unknown. Cf. Gneist, "Engl. Verwaltungsrecht," 3rd edit., 1883-84, 2 vols.



III. It is only in the province of *political reforms*, that is, in the *organization of local bodies*, and in the development of the parliamentary constitution, that the failures of the new order of things are seen. In the case of administrative reforms, the excellent business habits of the ruling class, and, in the field of social reforms, the practical sound sense of the commercial classes benefited the land. For the following class of laws, on the contrary, the English parliaments lacked practical experience, no less than did the parliamentary bodies of the Continent. The organic statutes, out of which the parliamentary constitution grew, are traceable to the direct initiative of the monarchy when at the zenith of its power (Henry II., Edward I., Edward III., Henry VIII., and Elizabeth). The parliaments of the eighteenth century had only drawn their life from existing institutions. New creations of this kind were born as little of the party struggles of the eighteenth century as of the civil wars of the seventeenth; the Commonwealth, for example, did *not* leave to posterity *one single* organic law. Such new laws were now imperative, seeing that, in the transition to a new order of things, old bonds are dissolved and must be replaced by new, such as under the influence of strong impulses and favourable conditions took place in Prussia in the years 1808-1815, 1872-1876, but even there they were not due to public opinion, but to the monarchy. This problem could, however, be as little solved by the English Parliament, as by the Diets of the Continent, for the reason, that such laws are not wont to proceed from the struggle of the social classes for their share in parochial and political life.

The upper foundation of the English parliamentary constitution, namely, the *unity of the National Church* in the National State, was lost with the repeal of the *Test and Corporation Acts*. The now recognized religious equality was really at first only intended as a placing of *individual followers* of various confessions upon an equal footing. But in that these dissenters formed great and distinct religious systems, the religious equality of individuals did not content them; they now demanded more, an equality of *churches*. These pretensions were advanced by no denomination so intensely as by the Roman Catholic Church, which claimed the exclusive management of its own Church as being part of its doctrine. The Curia consequently proceeded to a formal organization of its spiritual offices and dioceses in England and Wales (1850). A new state of things now ensued, in which an organic legislation was needed to determine the legal limitations, under which several conflicting churches and creeds might co-exist in one single state (as in Germany).

On the other hand, the attempt made in the Ecclesiastical Titles Act (1851) to make the proclamation of the Roman hierarchy and the bearing of the episcopal title punishable by law, proved utterly wrong, and had soon to be abandoned. The reaction was felt in the demand for the disestablishment of the English Church in Ireland, and the further separation of Church and State, in the face of which the welcome revival of love for the Church made the position of the State all the more difficult. In spite of the deep roots she had struck in the nation, the Anglican Church could not prevent secessions right and left, both in ritualistic and in dissenting directions. The Scotch Presbyterian Church had by this time, over a dispute as to Church patronage, separated into two almost equal halves. The Irish Church question was deeply divided and bound up with an antipathy of races. In all three divisions of the isles, a powerful Churchdom, deeply rooted in the feelings of the population, demanded exclusive recognition. If this, according to the demands of the churches, was to control the whole private life and the moral and intellectual development of the people, it must needs uproot political unity. Though standing upon a higher step of civilization, Great Britain has only now arrived at the point where Germany stood at the conclusion of the peace of Westphalia: namely, at a division into a Catholic and a schismatic Protestant country, the further development of which must eventually lead to a dissolution of the imperial unity (as would also have been the case in Germany, had it not been for the indefatigable activity of the territorial administration and legislation), analogous to the way in which, in the nineteenth century, the separation between Belgium and Holland was brought about, which was due entirely to this condition of things.

Equally privileged Church systems, of which the one, with its pretensions to exclusive recognition, will allow no rival, whilst the other, with its claims to exclusive validity, is not wont to tolerate any civil equality in juxtaposition to itself, cannot both develop in autonomous liberty without destroying the unity of both State and people. Instead of reflecting what common institutions and legal limitations this state of things demanded, English society withdrew itself from the solution of this problem in its confused ideas of a "separation of Church and State;" as though a separation of the ecclesiastical and political man were possible, and as if the Romish or the Anglican Church would ever surrender its coherence and centrifugal tendency, even though the State (as the Prussian *Landrecht* does) gave them the appellation of "religious societies." The unavoidable problem of future

legislation for maintaining the unity of the State and nation was, however, at all events in its beginnings, seen in the institutions of a common civil register (1836), of facultative civil marriage, of common elementary schools, higher schools, universities, common burial grounds, etc. But at the present there only remains the negative result, that the granting of equal privileges to the conflicting churches and their closer conjunction dissolves the basis of the parliamentary constitution, and introduces into Parliament itself confessional fractions, in addition to the political parties.

The next essential basis of the constitution, viz., the internal cohesion of the *communitates* had, as far as was possible, been secured by the Reform Bill of 1832. But the progress of social and administrative reforms led only too quickly to an unintentional shifting of the foundations. The new municipal regulations of 1835 again enabled, it is true, the whole of the citizens to share in the civic government. But this municipal government, in its permanent separation from the police jurisdiction of the magistrates, from the parochial relief of the poor and other important branches, was so insufficient in its character, that it could do but little to arouse and keep alive the public spirit of the community. Added to this, was the contradiction (so much warned against by Sir Robert Peel), that in the municipal constitutions an universal and equal suffrage of all households was introduced, whilst the Reform Bill had only summoned the £10 householders to the franchise. Thus there forthwith arose here a tendency to extend the parliamentary franchise, thus creating a fresh contrast to the county constituencies. In the last-named, the organization of the gentry in the magistrates' petty and quarter sessions still continued, though their influence upon the lower classes was on the wane. The suspension of the militia system, which, since 1829, had been the rule did their influence no slight damage. Much further in this direction went the reforms in the pauper, highway, and sanitary administration, by which the justices of the peace were confined to a general jurisdiction and certain powers of inspection. Any further development in these loosely framed unions now depended upon the organization of local government in the *parishes*.

This lowest foundation of the parliamentary system had, thanks to the office of constable, churchwarden, overseer of the poor, and highway surveyor, as well as to the decided development of the local rate system, become such a stout pillar of the *communitates*, that we must look to the "cellular system" of the English parishes, in its close connection with the office of justice of the peace, for the real root of the resist-

ance made by the *communitates* in the great constitutional conflicts. The ruling class was, however, to blame for the fact that in the course of the eighteenth century the local parochial offices had become degraded beneath their real significance. The old office of constable had become reduced to a despised policedom, which the better-situated inhabitants filled with substitutes. The smallness of the poor and highway districts, which was pushed further and further in the interest of the large landed proprietorships, pressed down these offices likewise to a mechanical service, which was but little sought for and little esteemed. Even the much-boasted English jury suffered under the increasing evil, that all the better classes withdrew themselves from serving, partly by the aid of the law, and partly by the sheriffs' bureau. Whilst thus the offices sank deeper and deeper, the mass of local rates increased, and, indeed, in proportion as the said offices were badly managed. The demand for a radical reform made, accordingly, from the outset the economic employment of rates its chief point. The reform forthwith took the direction of an adequate control of the often exorbitant expenses by trustworthy men in the form of a board. All that the rate-payers claim, is a share in *determining* how their money is to be spent, and in *appointing* the officials who are to collect and spend it (influence and patronage), nothing more. Improvements in the poor laws, in the administration of highways, and in sanitation, nay, the whole province of social reform, required not only rates, but an extended personal activity for the present welfare of the district. These high personal duties (which were not forgotten in the German communal legislation) have been perfectly overlooked amid the English party struggles and conflicts. The degradation of the small parochial offices was attended by the consequence, that even in England the importance of the personal honorary office was completely underestimated. But, before all else, it was the nature of legislation born of parliamentary conflict, that only new rights, never new duties, were the objects of contention, for which latter in the present parliamentary elections it would have been utterly impossible to find a majority. In perpetual compliance with "public opinion," the legislature now let all *personal* obligation to serve on the new boards and parochial offices fall, and went even so far as to expressly release the parochial representatives from all personal "responsibility." (3) In the place of responsible

(3) An apparent exception is furnished by the English municipal law of 1835, which, in accordance with the old traditions of civic corporations,

speaks of an obligation to undertake civil offices. But such a precept only remains on paper, when an universal equal right of citizenship is extended

authorities for carrying on a legal local government, according to the principles of self-government, ratepayers' local parliaments were created, which, after John Stuart Mill, gradually came to be known as "local parliaments."

With this fatal step, that of *doing away with every personal obligation and responsibility within the commune*, the roots of the whole structure have been eradicated, and this change, but little noticed, will be productive of more momentous consequences for England, than the abolition of universal military service would for modern Germany. Here is *the organic fault in the political system of modern England*, a fault productive of even acuter symptoms. With this abolition of the personal duties of citizenship, the community actually passes into a *limited company system*, which quite erroneously goes by the name of self-government. The government of a commune can, from its very nature and essence, be as little based upon a system of voluntarism, as the national defence can be entrusted to volunteer corps pure and simple. The government of these integral limbs of the State-whole can only be conducted in accordance with the laws of the land, and the local resources obtained by compulsory rates may not be employed otherwise than to legitimate ends. But as the new boards declined all responsibility, the law was obliged to make the small paid clerks, auditors, inspectors, etc., as being State officials, responsible for such government, and, consequently, to place the rights of dismissal, discipline, and supervision under a central board. In order to make this inspectorial right effective, all details of this administration must be kept under the strictest control, exercisable by State inspectors and auditors. Thus arose the modern system of internal government by "boards," which, in its centralization and "tutelle administrative," is very similar to the French. But, together with the responsibility, the essential part of the official *influence* passed to the paid officials, and left only inferior functions to the remaining local commissions and honorary officers, so much so that the inclination of the upper classes to take part in it disappears more and more, and more still that of the justices of the peace to share in such a piece

to every household. Nine-tenths of these small households can never undertake a civic office or be called on juries, and are never summoned for the purpose, let alone being compelled to do so. The self-deception of the democracy in this matter can be statistically shown, where, as in Prussia, owing to the three-class system of the ratepayers the real performances of the small households are seen. The

author once (1860) proved, by the local statistics of Berlin and other towns, that the participation of the ratepayers of the third-class in the personal duties of the commune is even *considerably in arrear* of that which they yield in taxes, and that this very class, in demanding an equal suffrage in the commune, claims ten to twenty times as much as its performances would justify.

of business, where they are even made *ex-officio* members. The unavoidable consequence was, that the degraded constable's office surrendered all its police functions to paid policemen, and was finally entirely given up by the legislature, and that the overseers of the poor and the highways were in great measure replaced by petty, paid officials. To external view, the result of these reforms may be summarized as follows: A corps of gendarmerie in uniform, nearly 35,000 men strong, and an almost equally strong staff of clerks and subordinates, as successors of the officials of self-government; a retirement of the wealthy and educated class from parochial life; this government held together and kept going by a wider and ever wider system of ministerial inspectors and rescripts. The extinction of a "parochial mind" is the ever louder cry, without reflection how party legislation has, in eager rivalry, brought about this dissolution of the moral and legal bond of union in the communes; so that ratepayers now stand side by side like so many shareholders in a company. This causes even the feeling of personal community in a union of neighbours to disappear, whence proceeds a further demand for a ballot, by which the elector completely isolates himself, and declines all moral responsibility, just as the representative of the parish refuses all legal responsibility. The bureaucracy humoured public opinion here also, by the invention of nomination papers, sparing the electors all trouble of meeting, deliberating, consulting, and counting; thus reducing the act of electing to a few strokes of the pen, which the elector puts on his voting paper. This is the last residuum of self-government, the sole trouble with which the industrial society of these days believes itself capable of exercising and asserting the "sovereignty of the people."

So do the *communitates* from year to year become further dissolved, these bodies upon whose *personal cohesion* the parliamentary system, at its rise as also in the course of its further development, rested, (4) and naturally do the altered views of the reorganized bodies react upon the House of Commons, upon the position of the leading party men, upon the press, and upon "public opinion."

The power of tradition has preserved to the elections, in the majority of counties, a certain permanent character, which is also the case with a great number of enfranchised towns; least of all, of course, in the rapidly increasing populations of the great manufacturing centres. But, in proportion as the process of dissolution proceeds, do purely social views and opinions assert themselves, whose feelings are dependent upon the last impression, and whose aims are directed at

(4) Cf. Gneist, "Engl. Self-Government," 3rd edit. (1871) chaps. 9-12.

their closest interests. The House of Commons has for a long time past appeared to these circles to be no longer a representation of communities—being organic unions of State, Church, and society—but as a representation of the temporary interests of the inhabitants of certain districts or groups. Whilst it is precisely in England that the institutions of the parish and the county, the parliament and the Church, have long laboured to form the counter-pole and the counter-organism of social interests, to compel the individual and accustom him to understand and fulfil his personal obligations in the life of the community, even against the natural bent of his interests: so also, after the parochial mind has become extinct, does society conceive of patriotism, self-control, and a sense of justice as products of voluntarism. Immeasurably multifarious is now the growth of social ideas, as to the improving of popular representation by new groupings and distributions. Woman's suffrage has obtained a considerable minority in the Lower House, and the "representation of minorities" scheme a considerable support in the Upper. Even many ministerial programmes for a second Reform Bill make the impression of *dilettanti* attempts. Every plausible idea of a new grouping of interests is regarded as an important discovery, until forgotten over the next fancy. Only up to this point does society become more and more unanimous: that the individual shall exercise his share in the "sovereignty of the people," isolated and alone and without responsibility, that is by the "ballot." The more the *douce violence*, with which the parliamentary constitution, when at its zenith, pressed upon social interests, made itself felt, the freer did the English elector fancy that he breathed under the ballot.

As soon as local unions have ceased to form the links in the chain of public interests, there remains only the *press and the right of unions* as the common bond.(5) As the last-named can only exercise its influence locally and temporarily, the press, which has now attained its full liberty, remains the leading factor. After the censorship (1695) had been removed, a very sensible limitation was still left in the draconic jurisdiction of the courts of law, in cases of sedition, conspiracy, and libel. By the Fox Act (1792), this limitation was much weakened, as the jury were now required to deliver their verdict as to the criminal intent of the author. Ever

(5) It is nothing but self-deception, if we believe that this dissolution of the bases would be improved were groups of proprietors, professions, religious societies, etc., to be all formed once more into corporations. The lack of a common bond of society

becomes thus all the more felt, and the more does the press and the political right of union remain the sole bond; with which the representation of the nation could under such circumstances attach itself to the Government.

since the Reform Bill of 1832, the criminal prosecution of the press by the Attorney-General was considered to be ill-advised and unpractical. Lord Campbell's Act (1842) enunciated what was really an already existing practice: declaring the intention of "promoting the public weal" to be a sufficient ground of justification. A statute of 1841 withdrew all publications issued under parliamentary authority from prosecution. The year 1853 abolished the taxes on advertisements, and the year 1855 the last remnant of a stamp duty. The struggle for the Reform Bill, and the powerful conflict of interests which raged round the repeal of the corn laws, had shown the hitherto unknown but now irresistible power of the daily press. It was now actually *free*, that indispensable and universally necessary organ for the protection of interests, in all its excellent and admirable efficacy; yet *irresponsible* withal, more irresponsible than the new boards, accessible to all errors, and thus insufficient for giving to social aspirations and aims that moral and legal check which the State needs. (6)

These new vacillating bases of the elective bodies show plainly enough the *altered party-groupings* of this generation. After the repeal of the Test and Corporation Acts, the time for practical action on the part of the High Tories and High Churchmen was past and over. The Moderate Tories, taking part in the government of the country, called themselves *Conservatives*. The term *Liberals*, for the Whigs, gradually became customary, yet with a left wing of Radicals, and many other generally uncomfortable associates. The large Liberal majority (486) in the first reform Parliament, became very soon diminished, owing to internal dissensions. The later parliamentary elections gave (1835) 380 Liberals to 273 Conservatives, (1842) 286 L. to 367 C., (1847) 325 L. to 331 C., the latter, however, divided into 216 Protectionists, and 105 Free Traders, (1852) 315 L. to 299 C., (1859) 348 L. to 315 C., (1866) 361 L. to 294 C. The appellation Liberals and Conservatives was, however, only a conventional term; as a matter of fact, there sat in the Parliament of 1837 six fractions: 100 Ultra Tories, 139 Tories, 80 Conservatives, 152 Whigs, 100 Liberals, and 80 Radicals. It is evident how much, owing to the constant disintegration into small fractions which was taking place, the difficulties of forming a cabinet, both harmonious within, and at the same time in accord with the majority in the Lower House were increased. And these difficulties were added, moreover, to the more and more com-

(6) The development of the importance of the press, which a hundred years previously made its power felt

(1769) in the famous and notorious letters of Junius, could here be only generally referred to.



plicated problems which the government of a world-wide empire was called upon to solve.

There was scarcely a single year, in this period of 35 years, which was not marked by bad harvests and famine, by commercial and industrial crises, by revolts in Ireland, by the rising of Chartists and operatives, by rebellions in the colonies, by the insurrection of the great native army in India, and by great foreign wars—all this intermingled with internal conflicts as to protection and free-trade, and great social and ecclesiastical interests. The necessary consequence was a rapid change of ministers—Grey, Melbourne, Peel, Russell, Derby, Aberdeen, Palmerston; 13 changes within 35 years.

The weakest point, however, was and remained the organization of the parish and new reforms in the *parliamentary representation*.

For half a generation after the Reform Bill, public opinion was sufficiently busied with other questions, as not to think of extending the franchise at once. The claims made upon the reformed popular representation were so multifarious and numerous, that the House (after 1839) was obliged to decline the discussion of the petitions presented to it, and to content itself with printing the more important ones. But the almost universal suffrage, which the Municipal Corporation Act and the new local boards had granted, passed from the local unions into the parliamentary constitution. As the healthy bases of self-government once did, so now did the faulty bases of boards determine the character of the body elected from them. Once more it was the February Revolution in Paris (1848) which spread its contagion to England, and, in the year 1851, the motions of Locke King found such support, as to cause Russell's ministry to bring in a new Reform Bill on the part of the Government. In spite of his former assurance, that the reform of 1832 should be final, Lord John now arrived at the opinion, that the lowering of the qualification from £10 to £5 would even have a "conservative" effect. But a principle for electoral reform could no longer be found, now that the obligation to do *personal* service had been abandoned in the whole chain of local institutions. Meantime also, the obligation to pay rates had been dropped, since, in order to render the collection of the smaller rates easy, it had become permissible to levy upon the *landlord* instead of upon the *occupier* (compounding rates), which in the great majority of cases was very soon taken great advantage of. By a fiction of law, the occupier might exercise the franchise, "as if he paid rates." If thus the payment of rates as a condition of a right to the suffrage was removed, a qualification

of £5 remained just as justifiable as one of £10 yearly value. But all disputing upon the point led to resolutions passed in numerous assemblages demanding the lowering of the qualification. All discussion led to the same result in the eyes of public opinion. Then began a rivalry between Liberal and Conservative party ministers with offers of reform, and continued for half a generation; each party endeavouring to take the wind out of the other's sails. At the last crisis, (1866) Gladstone offered to lower the qualification for *occupiers* to £14 in counties, and £7 in the boroughs, but was out-trumped by Disraeli, who (with certain amendments on Gladstone's side) descended to £12 for the counties and a general uniform household suffrage for the boroughs. In a parliament, wearied out by electioneering discussions, the third reading of the Reform Bill of 1867 passed the Lower House without a division, with the following results.

I. *With regard to the constituencies*, the second Reform Bill was forbearing. It disenfranchised no borough entirely; 38 boroughs (under 10,000 inhabitants) were, however, restricted to a single member. Liverpool, Manchester, Birmingham, and Leeds, received an additional member each; ten new boroughs were created. In constituencies returning three members, for the future only two votes to be given, in order to realize the experiment of minority-elections. (7)

II. *As to qualifications*, the forty-shilling freeholders in the counties retain the franchise, but a freehold for life only in case of actual possession; the £5 freeholders obtain it even without this condition. In the same way, the copyholder and the £5 leaseholders, all the rest as £12 occupiers. In the boroughs, every householder (whether landlord or lodger) of a dwelling or an independent dwelling obtained the franchise; sub-lessees also, if the lodging represented, unfurnished, a value of £10. (8)

III. *The electoral procedure* remained for the present unchanged, yet the introduction of the ballot was looming in sight. At the same time, the Lower House renounced its jurisdiction over disputed elections and left the same to the judges of the Supreme Court.

On the passing of the Bill into law, the result was foreseen to be an increase of 2,000,000 in the electors, and, judging from the success attending the doubling by the first Reform Bill, the probable success of the trebling by the second could to a certain extent be foretold.

(7) The attempt still to make the actual payment of rates as a condition of exercising the franchise, will be discussed in the next chapter. Cf.

Lely and Foulkes, "Parliamentary Election Acts, 1885."

(8) Cf. Lely and Foulkes, "Parliamentary Elections Acts," 1885.

## CHAPTER LIX.

**The Parliaments of the Nineteenth Century down to the Third Reform Bill (1884-85).**

THE second Reform Bill, after its full development (1885), produced the following result, as regards the electors to the Lower House in England and Wales.

## 1. In the counties :

Freeholders, copyholders, etc. . . . .	514,226
Occupiers and tenants . . . . .	252,493

## 2. In the boroughs :

Householders and lodgers . . . . .	1,592,225
Sub-lessees . . . . .	21,918
Owners, etc. . . . .	87,589

8. Altogether : county electors, 966,719 ; borough electors, 1,651,732 ; moreover, 810,441 voters for Scotland ; 224,018 for Ireland, and 80,642 additional electors for the universities. Grand total, 3,183,552.

When compared with the elective systems of the Continent, this was no excessive extension of the franchise ; for England it was sufficient to make the *organic fault*, which had been caused by the disarrangement of the bases of the parliamentary constitution, both patent and palpable, most of all in the province of political reforms.

The group of *social reforms*, which two decades earlier had done away with the elective qualifications of members of the Lower House, now proceeded to assail the remaining bulwarks of the old ruling class. On the occasion of making reforms in the army, the qualification for officers and for commissions in the militia was abolished, as was also the lord lieutenant's right of nomination ; in the standing army, the whole system of purchase was abolished. In the Upper House, motions for depriving the bishops of their legislative functions were rejected still ; but a beginning was made by the removal of the Irish bishops. In like manner, a proposal for making up the full complement of the House of Lords by the creation of life peers (1869) was negatived ; but, in reforming the Courts

of Justice, some life peers were added to the Upper House; a precedent which will be abundantly followed. Still more serious is the attitude of public opinion towards every attempt at resistance in the Upper House; on all such occasions, the influential press lets loose in reflections as to the practical value of a "second chamber," which no longer betray any thought of the political and constitutional significance this institution has for England.

The economic privileges of the landed classes suffer a severe blow in the unhappy conditions obtaining in Ireland, where the radical land bills attempt to make good the wrongs of ages by attacks upon the property of living generations. Further onslaughts upon family entails, and the difficulties in the way of the transfer of land, have, for the present, only obtained some limitations of the first, and some simplifications of the second. But the agitation against the immoderate extension of the *Latifundia*, and for converting the system of tenure into peasant proprietorships, under the catchword "free land," appears steadily on the increase, and will, within measurable distance, assume a very threatening form.

The demand for the equality of Churches again begins its attack upon the Anglican Church in Ireland, the position of which, as the sole privileged Church for little more than a tenth of the population, became, after the Act of Emancipation, more and more untenable. After comparatively little resistance, this Church was (1869) "disestablished," and partially deprived of its property—as the first step towards a further process of disestablishment, which began in England (1868) with the abolition of the church rate.

Laudable, however, is the steady progress of social reforms in the interest of the *working classes*: the wider application of the factory acts; thorough improvements effected in the sanitary system, entailing very heavy pecuniary burdens upon the parishes; the energetic institution of compulsory schooling, with the lowering or abolition of school fees, and with a rapid increase in the number of school-board schools for children of all denominations; the progressive laying down of a "*jus æquum*," determining the respective liabilities of employers and employed in comprehensive new laws; the provision seriously made for the amelioration of the dwellings of the working classes and other kindred measures, all which, though they do not prevent the revival of socialistic movements, will yet tend, to a certain extent, to keep them within legal bounds.

The second group of *administrative reforms* likewise assumes a more resolute character.

The standing army is made a normal national institution, by the promulgation of an army Administration Act in fixed terms (reserving an annual confirmation or emendation), and by the abolition of purchase of commissions in the army (entailing a pecuniary sacrifice amounting to £8,000,000); further, by ranking the East Indian army in the armed forces of the State, by definitely organizing the limbs of the army, by the formation of reserves, by incorporating the militia and the volunteer corps into the system of the army reserve, and finally by a uniform and strict administration of the whole in the newly organized War Office.

*The reform of justice* (after a protracted resistance) now gives to the Supreme Courts also a completely modernised form, by uniting the Lord Chancellor, the Vice-Chancellors and all the Lords Justices into one Supreme Court of Judicature, consisting of five divisions and a Court of Appeal; fusing, as far as possible, the Courts of Common Law, of Equity, the Ecclesiastical Courts and other special courts into one single tribunal, with an entirely remodelled procedure.

In the province of *finance*, important alterations are effected by the organization of the disintegrated tax department into two Revenue Offices, by the extension of the postal system, by the State purchase of telegraphs, and by the extension of State supervision over private railways.

In the *home* department, local government continues to make steady progress by means of *boards*. The poor-law burdens pass from the parishes to the unions, and the highway and sanitary supervision gradually coalesces with the same system. The new small unions, or agglomerations of parishes, are to be brought, as far as possible, into connection with the magisterial police divisions. In the towns, legislation aims at fusing, as far as possible, the town council with the several boards constituted for the management of the poor, the highways, and sanitary matters. The bureaucratic system of home government is comprehended (1871) under a new ministerial department (Local Government Board). The elementary school administration takes a similar course, though in smaller spheres. The remnants of self-government are thus extinguished in the villages. The parish is reduced to a mere district for the collection of rates and the election of boards. The total result of these formations is given by the census of 1881 for the local government as follows: 242 towns with municipal government, 649 unions, 424 highway boards, 1006 urban sanitary districts, 277 rural sanitary districts, 2051 school-boards, 5064 parishes for highway administration, 14,946 parishes for poor-law administration, 13,000 church parishes and some other less numerous

formations, all which are in imminent danger, on the occasion of the next reform, of being reduced to a mechanically uniform system of boards under the control of the central authorities. But the boards, with their universal suffrage and ballot, are paving the way for more advanced parliamentary reform.

There now follow for the reform of the universities, the yet more radical University Reform Acts (1880); whilst the popular educational system is benefited by the National Education Acts (1870, 1878, 1876), which, by insisting upon compulsory schooling, by uniformly constituting school-board commissioners and inspectors, by placing all denominations upon an equality, and by the employment of considerable State funds, develop and extend the elementary school system as the law intends. Parliament itself is responsible for the saying, that after the large extension of the franchise "our future masters" must to some extent be educated for their profession.

The reform of the Civil Service, after the eradication of the abuses of party-patronage, though somewhat pedantically, has, on the whole, been successfully carried out.

Even in this sphere of action, an unprejudiced opinion cannot refuse to recognize the practical shrewdness and energy of this parliamentary legislation, so far as is necessary for the attainment of the nearest aims and objects.

But the dark side is seen in the third province; that of the organic legislation affecting the local and parliamentary constitution, where disintegration proceeds at a rapid pace.

In the discussions precedent to the passing of the Reform Bill of 1867, a serious attempt was made, upon the Conservative side, to insist upon the payment of rates as the condition and test of all rights of suffrage. The difficulty of carrying this scheme into effect was due to the fact, that the suffrage was hitherto based upon tenure, as owner, leaseholder, lodger, etc. But yet this clause was passed, viz., that the occupier, for whom the landlord has undertaken to pay rates through the "compounding rates," should only have the suffrage, in case he *personally* undertakes the payment of rates. But the force of habit and convenience, as well as the pretended difficulty of carrying it into effect, and before all else the tendency towards social equality, succeeded in breaking down this barrier. The poor-rate assessment law of 1869 quickly recurred again to the maxims that the occupier should have the suffrage, whether he paid the rate himself or *through* his landlord, provided only that somebody paid the rate. This solution certainly recommends itself, by its simplicity and apparently humane consideration, relieving, as it does, the

working classes from house rates and all direct local taxes, in the same way as the upper classes have on their part also released themselves from all personal obligations. But the results will show on a large scale that the legislature, by releasing the citizen from every civil tie, has left the "general rights of mankind" as the sole basis of the claim to exercise the highest political rights. The reduction of the citizen's position in the State to the abstract notion of "citoyen," the "atomizing" of society, which we are otherwise wont to ascribe to a single political party, was here compassed in active rivalry by both parties together, for the applause of public opinion. Henceforward there was no longer any principle extant that could resist any claim to the franchise—no, not even the enfranchisement of women and minors. There was thus presented a real chaos of new ideas of reform. The innate right thus created, then, logically claims to be exercised as a personal right of sovereignty, independent of any connection with any commune, and without any kind of responsibility, by ballot, which latter soon became a storm and stress-demand of this period, and immediately followed the second Reform Bill (1872). The Upper House attempted to resist, but in the ensuing session gave its consent to the bill as a temporary measure, with which mental reservation from year to year the ballot exists until to-day.

The motions for *extension of the franchise* thus supported, immediately followed the publication of the second Reform Bill. The equality cry at once attacked the unequal representation in borough and county. Why in one case an equal household suffrage, and in the other a qualification? The cry for "equalization" appeared already in 1872 in new motions for reform. Still more momentous was the demand for the equalization of the *constituencies*, that is, for the creation of electoral districts, equal in point of population. Pitt's old maxim, that the electoral districts should be formed according to an average amount of population *and rates*, now appeared to have been forgotten. The parliaments only withstood the ever-increasing pressure of popular demands for half a generation longer, that is, until the third Reform Bill (the Representation of the People Act, 1884), and the law for the redistribution of the electoral districts (1885), which, with some kindred statutes, forms a group of nine new constitutional laws.

I. As to the *constituencies*, "equalization," that is, a radical reconstruction of the electoral districts into *divisions with almost equal populations*, has now been carried into effect. To this end, 79 boroughs (of less than 15,000 inhabitants) have been entirely disfranchised, so far as electing a separate

representative goes; 86 boroughs (under 50,000 inhabitants) retain only one member; 14 great boroughs obtain an increase in the number of their representatives, according to the ratio of their population; 85 boroughs (having nearly 50,000 inhabitants) receive a new franchise. The counties are one and all split up into electoral districts, nearly equal in population, each division returning one representative. This single seat system has likewise been uniformly introduced in the case of the boroughs, with the exception of 28 middle-sized towns, which have been left to return two members undivided. The county of York, for instance, forms 26 electoral districts, the city of Liverpool nine. The total result of this arrangement being, that the counties return 258 members, instead of 187, and the boroughs 287, in the place of 297. The average population of a county division is now 52,800 (formerly 70,800), the average population of a borough division 52,700 (formerly 41,200).

II. As to *qualification*, the third Reform Bill is based upon the simple principle of equalization, in that the household rateability of the boroughs has now been extended to the counties. The occupation of a house or independent dwelling (or even of a lodging of £10 rent, unfurnished) suffices in the counties to give the franchise. In order to make it equal with the boroughs, the qualification of occupier in the counties has been reduced from £12 to £10. All former rights to the suffrage have been reserved as in the former reform bills; some electoral privileges have, moreover, been newly created in favour of service occupiers.

III. With respect to the *electoral procedure*, the polling hours have been fixed at from 8 a.m. to 8 p.m., during which the votes may be given, on the nomination-paper system, at the convenience of the privileged elector. The other amendments to the Corrupt Practices Bill and the electoral procedures are of no importance. The number of new voters, according to an unreliable calculation, is taken at 2,000,000; yet certain it is that the newly enfranchised are even less fitted to continue the time-honoured parliamentary government, than the 2,000,000 last admitted to the franchise before them.

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The burst of enthusiasm, which accompanied the passing of the first Reform Bill into law, had spent itself before the arrival of the second. The third passed with a feeling of resignation in both camps, after both opposing parties had, however, each used all the methods of agitation to outbid the other.



The hope of the Conservatives, that the increase in the number of county members and the division of the great towns into several electoral districts will benefit their cause, will not be realized. For the advantage thus accruing to them will be more than outweighed by the fact, that the magisterial gentry lose their great bond of union in the counties, and are for the future distributed in knots among the small divisions of the shire, each with their loosely connected poor-law boards, parishes, and extinct boroughs. To this is added the unhealthy want of a landed peasantry and a settled agricultural population. Both parties will henceforward be doubly dependent upon the interests and feelings of the times.

As in the ecclesiastical reformation, so also in this transition to the new social order, England proceeded in the opposite way to continental states. Though standing upon a higher step of development, England only at the close of the nineteenth century attained to the analogous conditions obtaining on the Continent at the commencement of its constitutional formations. A House of Commons still exists in name; but there are no longer *communitates*, and no longer the now antiquated responsible bodies; nothing remains but mere social groups, which find in the press and in their federations their common bond of union. After the disappearance of that cohesion, which in the old *communitates* modified their joint interests by paying consideration to the demands of custom and law, and which habituated the electoral bodies to that measure of self-control, political sagacity, and respect for law, which enabled a parliamentary party-government to exist with honour, we find those social views alone of influence which are perpetually engaged in struggle for rights, and which, with the regularity of clock-work, repeat themselves in one and the same direction among the civilized nations of our day.

The social equality-cry always places in the foreground its claims to the following *fundamental* rights: liberty and equality of person, of property, of the right of forming unions, of the press, of religious denominations, creeds, etc.,—all perfectly justifiable immutable postulates of modern society, but which, as abstract watchwords for heterogeneous conditions, lead to contradictory pretensions which are never satisfied.

The equality-cry of society claims, under the name of *self-government* and local liberty, not responsible bodies to carry out the laws and tasks of the State, but freely elected boards with autonomous powers to frame resolutions and grant offices.

The social cry of equality, as soon as it has descended from the middle ranks down among the working classes, demands still more, an equality of property, and an *equal value* for

*labour*; which, hand in hand with the cry for political equality, leads to unsolvable and violent contradictions to the nature of society, the Church, and the State, but opens on *every* side to the demagogues free scope for action.

Without seriously and uniformly enforcing the *personal* duties of citizenship in the State, never and nowhere will a stay be found against the elementary power of these currents. If that tendency towards equality showed itself with redoubled vigour after the second Reform Bill, so will it, after the third, with threefold force give the social, administrative, and political reforms an acute character, to the further democratizing of the constitution and the bureaucratizing of the Government, for which the era of "radical parties" has now arrived, and with it the time of the caucus and political wire-pullers; although the nation has naturally little inclination to imitate American institutions. It is not street-excesses, as in former decades, that are the danger of the living generation, seeing that the popular education has become improved, but the puritanical fanaticism of the cry for equality, that will follow more Bentham's lead than that of the French, but which will on that account be all the more acute.

We might, on the other hand, again object, that the modern formation of the elective bodies is similar to what has been attempted more than once in continental States (under strong monarchical initiative and control) without jeopardizing them to any great degree. But the tenfold increase of the electors in a single half century has another significance for England, since the existence of ministries and the conduct of the government of the realm has become almost exclusively dependent upon the House of Commons. Now that all sanctions for moderating the struggles for social interests have ceased to be, *this* kind of party-government falls into a helpless dependence upon incalculable combinations of social interests, upon the relatively strongest prejudices, upon political agitation and the tactical artifices of party-governments, to which, under the second Reform Bill, both Disraeli and Gladstone have owed their position.

The necessary separation into a Conservative and Liberal parliamentary party, so essential to parliamentary government hitherto, exists no more in reality. Side by side with these two parties, there are (as in Germany) radical, confessional, national, and fractions of class interests, independent members, and others, whose numbers are slowly but steadily increasing. The attitude of the English parliament has become so much altered under the influence of these elements, that the House has been compelled to resolve upon considerable restrictions of the right of speech, and once (in 1881)

had even to exclude thirty-two unruly members. Ever since the Reform Bill of 1867, the disintegration of parliamentary parties has set the quasi-dictatorial influence of a single man, as the *personal* representative of the momentary average of public opinion, in the place of a party-government conducted in the traditional manner. Hence, until the era of radical governments, coalition ministries will alone be possible.

This situation impels us to a comparison with the older experiences of the Continent. Marvellous is the *blindness of the propertied classes* to the immediately approaching crises, which results from the fact that, in the narrower social spheres, the dislocation of the great political institutions is not perceived. A peer living as a private gentleman, who in former generations formed quite an exception, becomes rather the rule, at the very time when the Upper House will shortly have to struggle for its very existence. An irresistible desire to travel comes over the English gentry at a time when their presence at their country seats is more necessary than ever, in order that they do not entirely lose their local influence. The daily press, and literature generally, move with untiring energy in all the spheres of natural and moral sciences, just as if the great English political system was in a haven of rest. The daily press lives on in a state of self-forgetfulness and self-deception as to the vital conditions of the State, as if the burning question as to the "to be or not to be" of the parliamentary constitution must further be decided by the papal infallibility of "public opinion." Everything precisely as it was once in Germany and France before great catastrophes.

But at the same time our older experiences suggest a mode of solving the problem. Insensible as public opinion appears to be to the sight of the abyss in which the State is moving, yet, in proportion to its blindness, wonderful and violent is the *change* wrought, as soon as the political and social catastrophes have occurred, whether they come at first from without or within, or, as ordinarily happens, from both sides at once. The outsider may venture to prophesy, that public opinion will be difficult to recognize at the close of the century, and that the influential daily and periodical press of these days would be astonished, could it only be allowed to read itself at the close of it, and to see how disastrous for the fate of nations its idolatry of "public opinion" has been. The propertied classes, in defending their own, will certainly not at first display their best qualities, but the nation as a whole will do so. Only amid the blows of fate and trials do noble and grand nations show their true nature; only then does the sense of duty towards the State, to-day

latent, awake in full vigour. In this time of trials, France and Germany gained the capacity to impose upon themselves the heaviest sacrifices of which society is capable—namely, universal personal military service. The courage, the strength of character and the practical sagacity of the British nation, now standing before us after a thousand years of steady development, are guarantees that here also the political sense of duty will re-awake and accomplish the re-construction of the ruined bases of its free political system. Like as the human organism possesses the vital energy necessary for restoring or replacing injured or mutilated functions, so too does the State possess this vitality. The first problem the organic legislature has to face is this; to take in hand the necessary work of reconstructing the county-constitution, in which the *restoration of the personal duties of citizenship in self-government* has for England almost the same signification, as universal military service imports for continental nations. As soon as this problem is taken in hand, the propertied classes will at length perceive the disintegration that has been proceeding in their political body, and, it is conceivable, that, under the moderamen of the monarchy, a check to its further progress will be given, and a change take place for the better. At all events, the Crown will avert the extreme dangers attendant upon a democratic conduct of the *foreign* affairs of such an empire, owing to the fact that it has already (1850) grasped these prerogatives of its own with a firm hand. In the life of nations, as in that of individuals, it is friends, who instead of flattering, foretell the approaching storm. Uniform as is, however, the current of social movement in the mid-European world, yet its issue has been various, according to the differences of nationalities and their previous political history.

It has been ordained that the life of a nation, as of an individual, should, for its future weal, undergo such trials: yet the whole of the past history of the British State, as it lies before us in its thousand years' development as a creation of the moral and legal consciousness of the people, justifies our confidence that it will brave the storms before its path and, like the German nation, whose latent strength has ever resided in its communal system, find in its *own* past the stones wherewith to reconstruct the edifice of its free political system.

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#### THE IRISH QUESTION.

NOTE TO CHAPTER LIX.—The thorn in the side of the parliamentary constitution, which is destined to urge the

halting movement into action, is Ireland, where the conditions of property, owing to confiscations *en masse*, centu-

ries of desolation and robbery, have come into an unnatural position. The dispossessed native population agitates for an Agrarian Legislation; a national middle class upon hereditary estates. But the model close at hand, the often quoted Stein-Hardenberg agrarian legislation, is not applicable to Ireland. That Prussian legislation assigned the fee-simple of the land to a peasantry which had, for generations past, paid the land-taxes and done personal military service in the place of the noble landowners. The legal title to the acquisition of a "divided property" was the same as in the middle ages, when the nobles claimed and demanded the hereditability of their fiefs.

The new Irish land bills, on the contrary, involve a partial confiscation of private income, from purely political and economic views of utility, for which neither legal title, nor measure, nor limit can be found. The greed engendered of them will next extend to Scotland, Wales, and old England, and, hand in hand with the attacks upon the English State Church, drive the great landowners and the ruling class from a conservative into a reactionary attitude.

The social tendency thus begun can, however, only end in a *severance* of Ireland from the parliamentary union of Great Britain. The ever-loose coherence of both parts of the realm entirely loses, owing to the hostile contrasts of both powerful Churches and the keen antipathy of races, the conditions precedent to a common popular representation. This separation of the Irish political body will even be necessary, in order to restore to the Parliament of Great Britain that fundamental unity upon which both the parliament itself and the several parties depend for their capability for action. On the other hand, Ireland must be given that kind of constitution (home rule) which is practicable in the case of an essentially

Celtic nationality and a population split asunder by the contrasts of religion and race. This form of the future "imperial dependency" will, I believe, approach that of the "Napoleonic Constitutions;" a parliament, the members composing which are mostly appointed by the Crown, and a prefectorial system with deliberating "councils," which last are even now, in some parts of the country, attaining to greater independence, and this leads us to hope that real self-government will, within the next generation, be attained. That the highly-gifted Irish nation is, owing to its want of self-control, but little suited for the direct application of English institutions, is proved by the experiences of the United States of America.

The experiences made in Germany, under a strong monarchy, might seem to warrant that these organic reforms might be all effected *simultaneously* after Gladstone's plans. But, under the present system of *party* administrations, they can only take a course accompanied by violent and fitful movements within the great social body. They go too far in both directions to suit the present party-programmes, and call in view an "era of radical parties" which alone will be capable of passing Irish land bills, introducing reforms in the land and effecting a certain "disestablishment" of the Anglican Church. It will probably be reserved for the reactionary epoch ensuing to give the "imperial dependency," Ireland, a fitting constitution. This done, and when political parties have calmed down, we shall be able to look forward to the beginning of the internal reconstruction of the constitution upon the basis of the new "communitates," now once more coherent, to the reconsolidation of the influence of the propertied classes, and to the return of normal parliamentary activity.



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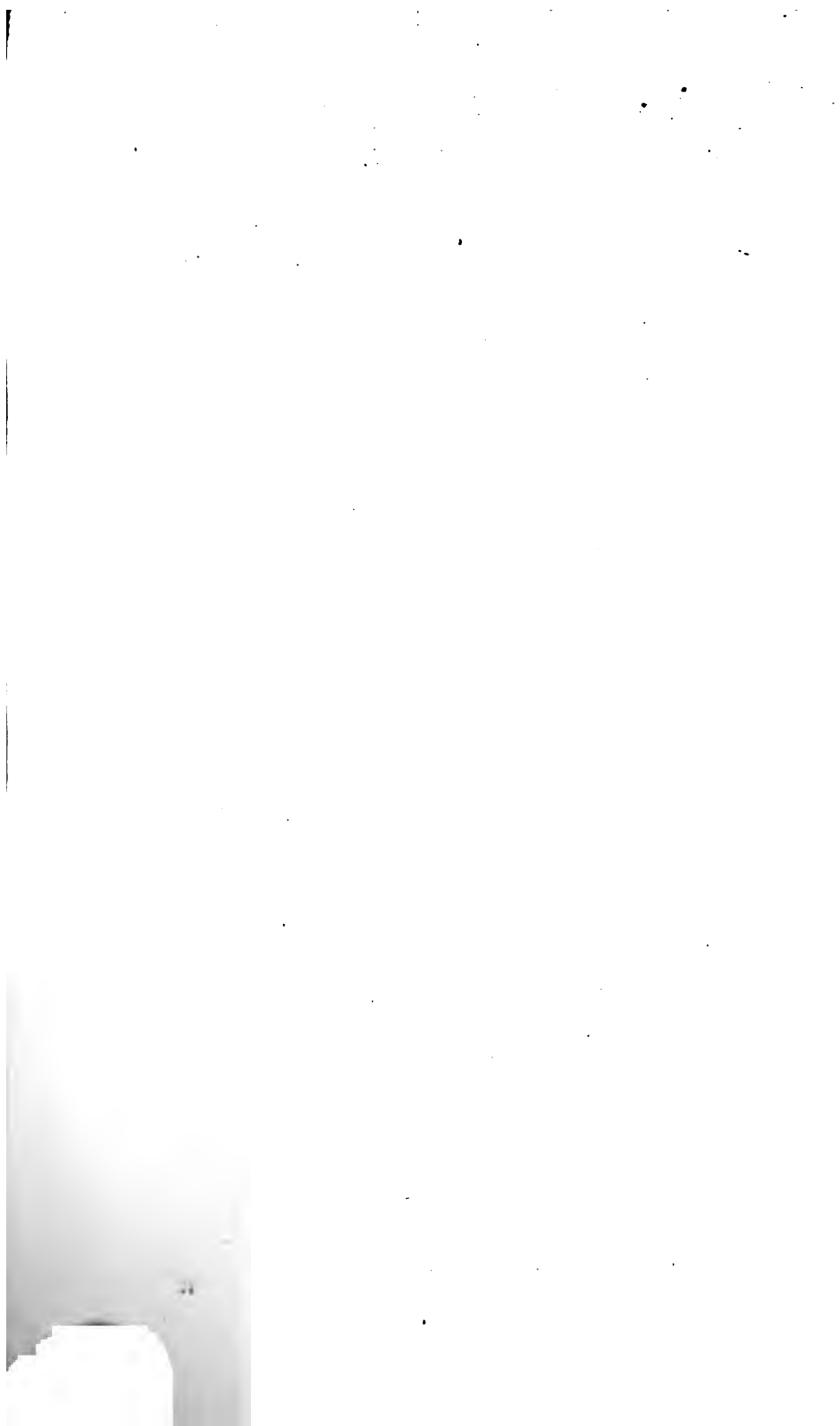
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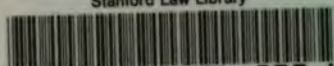








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